Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

Term: October, 1993

THOMAS VENEZIA,

Plaintiff-Petitioner,

v.

BONDS ROBINSON, JR.,

Defendant-Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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A. QUESTIONS PRESENTED:

I. Was there federal jurisdiction in this case?

II. Does the U.S. Seventh Circuit Court of Appeals and/or the U.S. District Court for the Southern District of Illinois have the power to regulate the Illinois Code of Civil Procedure?

III. Did Thomas Venezia have the right to have extortion and bribery against him enjoined, even if the extortion and bribery were committed by a federal law enforcement officer who purported to be acting in his official capacity?

IV. Did Thomas Venezia have the right to engage in the lawful vending business in Belleville, Illinois, without a federal law enforcement officer interfering with that lawful business by telling the Belleville Liquor Commissioner that the FBI had a videotape of Thomas Venezia bribing president Bill Clinton?

V. Did Thomas Venezia have the same right to conduct discovery as every other litigant, the right this Court explained in Herbert v. Lando, 441 U.S. 153, 60 L.Ed.2d 115, 99 S.Ct. 1635 (1979) ?

VI. Did an Illinois state judge have the jurisdiction to rule on issues that were properly before him without the U.S. Seventh Circuit Court of Appeals complaining against the state judge to the Illinois Judicial Inquiry Board?

VII. Did the U.S. Seventh Circuit Court of Appeals err in denying Thomas Venezia's motion to supplement the record, given the fact that the U.S. District Court for the Southern District of Illinois had denied Thomas Venezia the right to conduct any discovery whatsoever?

B. LIST OF PARTIES:

All parties to this action appear in the caption.

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D. A REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS OR ADMINISTRATIVE AGENCIES.

The February 9, 1994 Order of the Seventh Circuit from which review is sought is contained in the appendix and is reported at 16 F. 3d 209. The May 18, 1993 opinion of the United States District Court of the United States District Court for the Southern District of Illinois is also contained in the appendix but has not been published in an official or unofficial reporter.

E. JURISDICTIONAL GROUNDS

The Seventh Circuit judgment sought to be reviewed herein was entered on February 9, 1994. (A-1-6) Venezia's request for rehearing was denied on March 2, 1994. (A-16) The jurisdiction of this court is invoked under 28 U.S. C. §1254(1).

F. THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED:

U.S. Constitution Amendment V
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See appendix A48 - 51 for verbatim text.

G. STATEMENT OF THE CASE

Thomas Venezia was and is an honest citizen, engaged in the vending business in St. Clair County, Illinios. Venezia's company is called B & H Vending. The county seat is Belleville. Bonds Robinson, Jr. was and is an officer for the Illinois State Liquor Control Commission. Before Robinson got his job with the state, he had been a police officer in Centreville (St. Clair County), Illinois. (R. 24, Exh. A, p. 106) Robinson was fired from his police officer's job for raping a prostitute in the back seat of his police car. (R. 24, Exh. A, p. 107)

During April of 1992, Robinson began soliciting bribes

from Thomas Venezia. (R. 12, Exh.2, p.40) On April 28, 1992, at 11:55 a.m. Venezia's lawyer - Thomas Daley - calling from Belleville, telephoned the headquarters of the Illinois Liquor Control Commission at 312-814-2218 in Chicago. (R. 17, Exh. A; R. 24, Exh. A, pp. 28-30) Daley spoke with Eric Wisette, Robinson's superior at the Commission, and reported that Robinson had been soliciting bribes from Venezia. (A-18) Wisette said it wouldn't surprise him if Robinson were soliciting bribes. (A-18) Wisette said he would put a stop to Robinson's misconduct. (A-18) This was Venezia's first report that Bonds Robinson, Jr. was soliciting bribes, and that report was made on April 28, 1992. Robinson later admitted under oath, that he was not working as a federal law enforcement officer before April 28, 1992. (R. 24, Exh. A, pp. 30-32)

Venezia next heard from Robinson in early August 1992. (R. 12, Exh. 2, p. 41) Robinson threatened Charles Tresser, a retired Air Force Chief who was the director of marketing for Venezia's company, that he (Robinson) would begin "knocking off" the taverns and nightclubs where B & H had accounts, unless Venezia agreed to pay bribes. (R. 12, Exh. 2, p. 41) Robinson was demanding a meeting. (R. 12, Exh. 2, p. 41) Venezia told Tresser to set up the meeting, so that Venezia could advise Robinson that "we won't do anything like that". (R. 12, Exh. 2, p. 41) Tresser arranged the meeting.

Robinson came to Venezia's place of business for the meeting on August 17, 1992. (R. 12, Exh. 2, p. 6) Robinson himself admitted under oath that at the meeting, he had demanded a bribe/extortion from Venezia of $250/week, or else he (Robinson) would begin raids and would seize Venezia's vending machines. (R. 12, Exh. 2, p. 21) Venezia told Robinson that he (Venezia) would not pay anything. (R. 12, Exh. 2, p. 45)

Immediately after the meeting, Venezia began composing a letter to Robert Haida, the State's Attorney for St. Clair County. (R 12, Exh. 2, p. 45) However Robinson continued to demand bribes over the next several days (R. 12, Exh. 2, p. 48), and on August 26, 1992, Robinson led a raid at VFW Post 4183 in St. Clair County. (R.12, Exh. 2, p. 45) Robinson seized four of Venezia's

vending machines. (R. 12, Exh. 2, p. 45) The next day Venezia sent his letter to Haida, reporting Robinson's bribe-attempts and the fact that Robinson had seized Venezia's machines because Venezia had refused to submit to Robinson's extortion. (R. 12, Exh. 2, pp. 46-47) This was Tom Venezia's second report, the first having been made on April 28, 1992. Venezia also sent a carbon-copy of the Haida letter to the FBI. (R. 12, Exh. 2, pp. 46-47)

The letter to State's Attorney Haida was hand-carried to him by Venezia's lawyer - Amiel Cueto. (R. 12, Exh. 2, pp. 46-47) Cueto delivered the letter to Haida at Haida's office on August 28, 1992, and Cueto and Haida discussed Robinson's bribe and extortion plot; they decided that Haida would call Robinson to the courthouse on September 1, 1992, on the pretext of a hearing, so that Cueto could subpoena Robinson to testify in the chancery court on that day; and that in fact was done. (R. 12, Exh. 2, p. 4) Robinson was served with both a subpoena and a Petition for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction. (R. 12, Exh. 2, p. 6) An evidentiary hearing was held, and at the conclusion the state court issued a preliminary injunction (R.2) which provided:

> "Upon verified petition and for good cause shown, this Court issues its Preliminary Injunction, enjoining and restraining Bonds Robinson, Jr. from threatening or coercing Thomas Venezia or any employee of Ace Music or B & H Vending; that Bonds Robinson, Jr. is enjoined and restrained from soliciting bribes or acts of extortion; that Bonds Robinson, Jr. is enjoined and restrained from unlawfully interfering with Thomas Venezia's Business and/or from unlawfully seizing the property of Thomas Venezia, Ace Music or B & H Vending."

The injunction was issued on September 1, 1992. On October 29, 1992 - 58 days later - Venezia filed a Petition for Rule to Show Cause. Between September 1 and October 29, neither Robinson nor the U.S. Attorney's Office for the Southern District of Illinois sought to dissolve the injunction; nor did they remove the case to federal court. They did nothing. On October 19, 1992, Robinson

had begun threatening seizure of Venezia's machines at the Tracer's Lounge and the Knights of Columbus, both establishments being located in St. Clair County. (R. 2) Robinson told the proprieters that in dealing with Tom Venezia, they were dealing with organized crime. (R. 2) This conduct by Robinson was a violation of the injunction, and predicated on this violation Venezia petitioned for a rule to show cause why Robinson should not be held in contempt. (R. 2)

On November 23, 1992, the U.S. Attorney's Office on behalf of Bonds Robinson, Jr., removed the case to the U.S. District Court for the Southern District of Illinois. (R. 1) Venezia filed a timely motion to remand (R. 5), a request to produce under F.R. C.P. 34 (R. 15), and a set of interrogatories under F.R.C.P. 33 (R. 15).

On April 2, 1993, the district court denied the motion to remand. (R. 21) On May 18, 1993, the district court granted the government's motions to dismiss and to dissolve the preliminary injunction; the court also denied all of Venezia's discovery requests. (R-22)

Venezia filed a timely notice of appeal. (R-23) While the appeal was pending in the Seventh Circuit, Robinson was called to testify as a witness for the St. Clair County State's Attorney's Office in the case of People v. Vogt, 93-CM-2852. Robinson testified on July 23, 27 and 29, 1993 in the St. Clair County, Illinois, circuit court. After the transcript of that testimony was prepared, Venezia moved on October 20, 1993 to supplement the record in the Seventh Circuit; however that court denied the motion without prejudice and instructed Venezia to apply first in the district court. On November 24, 1993, Venezia filed a Motion to Supplement the Record on Appeal in the U.S. District Court for the Southern District of Illinois. (R-24) That motion was denied. (R-26) Venezia next filed a Renewed Motion to Supplement Record on Appeal in the Seventh Circuit. (A-25) That motion was also denied. (A-44)

On February 9, 1994, the Seventh Circuit Court of Appeals delivered its opinion. The judgement of the district court was affirmed. In a footnote on page 3 of the slip opinion, the appeals court stated that Judge Radcliffe had engaged in "apparently inappropriate behavior" in that the "procedure (the chancery hear-

ing conducted by Judge Radcliffe on September 1, 1992) deviated from Illinois law". The court published in this footnote that it was sending its opinion and the district court's opinion to the Judicial Inquiry Board of Illinois, which is the tribunal vested with the power to discipline or remove Illinois judges. Venezia filed a petition for rehearing and a suggestion for rehearing in banc. The Seventh Circuit denied Venezia's Petition on March 2, 1994. (A-16)

I. STATEMENT OF JURISDICTION IN THE FIRST INSTANCE.

Review is sought from a judgement of the U.S. Seventh Circuit Court of Appeals. Federal jurisdiction, although challenged by Thomas Venezia, was based in the first instance on a removal by Bonds Robinson, Jr. pursuant to 28 U.S. C. §1442 (a) (1) from the Illinois state court to the U.S. District Court for the Southern District of Illinois.

J. ARGUMENT

I

There is no federal jurisdiction in this case.

The U.S. Attorney's Office for the Southern District of Illinois removed this case on November 23, 1992. This removal petition was filed 85 days after the state court issued its preliminary injunction. This petition was 55 days late. See 28 U.S.C. §1446 (b). However irrespective of the late petition, the district court and the circuit court erred in denying Venezia's motion to remand on substantive grounds.

The government removed the case on the ground that Bonds Robinson, Jr. was allegedly acting in the capacity as a federal law enforcement officer at all the times he was carrying on activities against Tom Venezia. [See slip opinion at page 4: "At **all events,** the United States Attorney contended that Robinson is a 'person acting under' a federal agent". (Emphasis added.)] The relevant statute is 28 U.S.C. §1442 (a) (1), which provides

"(a) A civil action or criminal prosecution com-

menced in a State court against any of the following persons may be removed by them to the district court of the United States for the District and division embracing the place wherein it is pending: (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals."

The record shows that Robinson began his bribe attempts against Venezia during April of 1992; indeed Venezia - through his lawyer - reported Robinson on April 28, 1992. The testimony under oath out of Robinson's own mouth was as follows:

"Q. Now, before, on April the 28th of 1992 or before, were you engaged in a criminal investigation of Tom Venezia on behalf of the Federal Bureau of Investigation?

A. No."

(See R. 24, Exh. A, p. 30.)

. . . .

"Okay. And when did that -- and you've already testified, by the way, that that was -- you had not been engaged in such an investigation before April the 28th of 1992. So we know that that investigation that you're talking about began on April or some time after April 28th of 1992 but before September 1st of 1992; is that correct?

A. Yes, sir."

"Q. How soon after the April 28th date, the date that Tom Daley called to report to your supervisor, how soon after that did the investigation begin?

A. I don't remember the exact day.

Q. I didn't ask you the exact day. I said how soon after Tom Daley reported that you were trying to solicit bribes did you begin the investigation on

behalf of the FBI?

A. I don't remember.

Q. Well, let's try it this way. Was it a matter of days, weeks or months?

A. Had to be maybe weeks."

(See R. 24, Exh. A. p. 32)

Under §1442 (a) (1) Robinson had the burden of proving that he was an officer of the United States or a "person acting under" an officer of the United States "at all events" related to Thomas Venezia. Not only did Robinson fail to meet this burden, the testimony cited above from Robinson himself proves that Robinson was **not** acting in any federal law enforcement capacity before April 28, 1992. This was the date when Venezia reported Robinson's bribe/extortion attempts for the first time. Clearly Robinson was not entitled to invoke §1442 (a) (1) to protect himself from being enjoined in the St. Clair County chancery court. He was not a federal officer when he initiated his shakedown of Tom Venezia; Robinson was nothing more than a common, garden-variety extortionist.

Robinson did go to work for the FBI, but it was many weeks after the April 28, 1992 report. Robinson then started up his extortion demands again. He insisted on a meeting with Venezia, and the meeting was set for August 17, 1992. At that meeting Robinson did have a tape recording device which the FBI had given him. But please remember that this meeting was on August 17, 1992, and this fact points to one of the more glaring errors in the circuit court's decision. At page 3 of the slip opinion, the court says: "Venezia depicted himself in the state litigation as an honest businessman trying to fend off a crooked state inspector; a less charitable view would be that after getting wind that the FBI had his bribe offer on tape, Venezia tried to put a better light on things by taking the offensive." However the record proves that Venezia - through his lawyer Tom Daley - had reported Robinson's bribe/extortion demands on April 28, 1992: **This was one hundred and eleven days before there was any tape.** And on what basis did the court conclude that Venezia had made a "bribe offer on tape"? There was

no evidence of that. Robinson never said anywhere that Venezia had ever made such a "bribe offer", on tape or otherwise. Venezia on the other hand, did testify under oath that he never made any bribe offer. (See R. 2, Exh. 2, pp. 41, 45) Venezia's testimony stands unrebutted and uncontradicted in the evidence. Shouldn't he have been vindicated by the circuit court of appeals, instead of being accused of making a "bribe offer on tape"? The FBI has adamantly refused to produce the tape. They're guarding it like the crown jewels. The plain fact is that **Venezia never made a bribe offer, Robinson made bribe demands.** The tape will prove that if Venezia can ever get it. The circuit court's opinion was not only rank error, it was an unjustified and shocking smear against Tom Venezia. The only court with the power to correct the lie that Tom Venezia had made a "bribe offer on tape" is this one. If this Court will take this case and reverse on grounds of jurisdiction, Tom Venezia can pursue discovery and prove by the FBI's own tape that he has done nothing wrong.

This Court has taught that removal statutes must always be construed with a due regard for the rightful independence of state government. Shamrock Oil and Gas Corp. v Sheets, 313 U.S. 100, 61 S.Ct. 868 (1941). Moreover, a defendant like Robinson has the burden of establishing that removal is proper, and all doubts must be strictly resolved in favor of a remand to state court. Jones v. General Tire and Rubber Co., 541 F.2d 660 (7th Cir. 1976). The law is thus clear that Robinson was not cloaked with the immunity of §1442 (a) (1). Most of the cases dealing with this issue are district court decisions. See e.g. Ryan v. Dow Chemical, 781 F.Supp. 934 (E.D.N.Y. 1992); Virginia v. Harvey, 571 F.Supp. 464, (E.D.Va. 1983); Bahrs v. Hughes Aircraft Co.,795 F.Supp. 965 (D.Ariz. 1992); Illinois v. Zidek, 691 F.Supp. 1177 (N.D.Ill. 1988). Your petitioner Tom Venezia respectfully prays that this Court will grant certiorari to provide some guidance on construing this statute. Bonds Robinson began a course of bribery and extortion against Thomas Venezia many weeks before he came under the authority of the FBI. That fact was admitted out of Robinson's own mouth. Should an extortionist who has had his crime reported to authorities, then be able to escape liability because he is later taken under the wing of some federal law enforcement officer? That is what

happened here, and your petitioner prays that this Court will correct this travesty.

II

The Seventh Circuit Court of Appeals does not have the authority to arrogate unto itself the power to be the regulator of Illinois Civil Procedure.

The Seventh Circuit Court's opinion in the case at bar is repugnant to our concept of federalism. Worse than that, if the holding is allowed to stand, the Venezia v. Robinson rule will wreak a havoc that will be nothing short of a catastrophe for Illinois litigants. This court settled the question of whether federal courts could regulate state statutory schemes one hundred and fifty-two years ago. [See Swift v. Tyson, 16 Pet. 1, 10 L.Ed. 865 (1842).] In Erie v. Tomkins, 304 U.S. 64, 58 S.Ct. 817 (1938), this Court held that federal courts were required to observe a state's common-law as well. It is important that this Court grant certiorari because the Seventh Circuit opinion for all practical purposes abolishes the remedy of preliminary injunction in the state of Illinois. The opinion holds that an application for injunction can only be sought after the defendant has been served with a summons and complaint, a preposterous notion that is unprecedented in the history of Illinois jurisprudence and which conflicts with Illinois caselaw going back more than eighty years. The opinion also renders void the Illinois Code of Civil Procedure at 735 ILCS 5/11-102, making the federal court the **de facto** regulator of Illinois civil practice. This statute has its roots in the Northwest Ordinance. That the Seventh Circuit would so cavalierly poleaxe the Illinois preliminary injunction statute into a nullity is flabbergasting. The Seventh Circuit opinion also **sub silentio** overrules the Illinois Supreme Court's decision of Board of Education of Community Unit School District Number 101 v. Parlor, 85 Ill.2d 397, 424 N.E.2d 1152, 54 Ill. Dec. 249 (1981), which held that Illinois civil procedure allows informal notice - in that case a telephone call - as sufficient notice of a preliminary injunction application.

A preliminary injunction is nothing more than a TRO with

notice, see Kaplan v. Kaplan, 423 N.E.2d 1253 (1st Dis. 1981). The statute in question provides as follows:

> "No court or judge shall grant a preliminary injunction without previous notice of the time and place of the application having been given the adverse party." (See 735 ILCS 5/11-102.)

The terms "preliminary injunction" and "temporary injunction" are used interchangeably by the Illinois courts because they mean the same thing, and it is not the purpose of a preliminary injunction to decide controverted facts or the merits of a case; see Wilson v. Wilson, 577 N.E.2d 1323 (1st Dis. 1991). The purpose of a preliminary injunction is to preserve the status quo until the court has an opportunity to consider the cause on the merits or on a motion to dismiss [see Bowman Shoe Company v. Bowman, 158 N.E. 2d 112 (1959)]; and/or to prevent a threatened wrong or a continuing injury pending a full hearing on the merits of the case (see Wilson v. Wilson, id). The "notice" referred to in the statute does not require service of a summons and complaint. Indeed, before the Seventh Circuit's opinion in this case, no court in the history of Illinois jurisprudence had ever held that "notice" of an application for preliminary injunction meant service of a summons and complaint. To the contrary, notice can be made by personal service, or by leaving the notice at the defendant's business address, or by mailing the notice, see A. Daiger & Co. v. Kraft, 281 Ill.App. 548 (1936); or by leaving the notice with the defendant's attorney, see People v. Kohn, 243 Ill.App.31 (1926); or even **by telephone,** see Board of Education of Community Unit School Dist. No. 101 v. Parlor, 424 N.E.2d 1152 (Sup.Ct. 1981).

Bonds Robinson received formal notice, informal notice, written notice, oral notice, personal notice, and actual notice; in short he received every kind of notice that a person can get. If the opinion in the case at bar stands, it will in effect overrule the Illinois Supreme Court's opinion in Board v. Parlor, id, not to mention a line of precedent which goes back to at least 1913; see Eperson v. Fox, 177 Ill. App. 141.

Before the opinion in the case at bar, it was thought that the question of whether federal courts have the power to regulate the civil procedure of state courts had been setted long ago. Swift v. Tyson, 16 Pet. 1, 10 L.Ed. 865 (1842) held that even though the federal courts were not bound by a state's common law, the federal courts were still required to observe the state's statutory scheme. Erie v. Tompkins, 304 U.S. 64, 58 S.Ct. 817 (1938), overruled Swift in that the federal courts were thenceforth required to adhere to the substantive law of the state — whether that law was judge-made or statutory. But never before has any federal court sought to regulate the civil procedure of a state; never before that is, until the Seventh Circuit Court of Appeals delivered its opinion in the case at bar. The Seventh Circuit held that the "notice" referred to in section 11-102 of the Illinois Civil Practice Act doesn't mean what the Illinois legislature and the Illinois Supreme Court say that it means. In Venezia v. Robinson, the circuit court purports to engraft on the Illinois civil procedure code the rule that a party who is not served with a summons and complaint cannot be bound by a preliminary injunction, even if that party has received all the notice that the Illinois legislature and the Illinois Supreme Court say is necessary.

If the opinion is allowed to stand, it will create nothing short of colossal confusion in Illinois. Every defendant who seeks to void a preliminary injunction will cite Venezia v. Robinson for the proposition that he must first be served with a summons and complaint! Since the very nature of a preliminary injunction makes such service of process impractical if not impossible in 99.9 percent of cases, the Seventh Circuit's opinion - if allowed to stand - will have the effect of abolishing the remedy for Illinois litigants.

Before Venezia closes on this point, another error must be noted. The slip opinion at page 4 asserted that:

> "A subpoena is not a summons, and, the district court concluded, handing the defendant a copy of the complaint in open court (as Venezia's lawyer did on September 1) does not satisfy either state or federal requirements of service. Venezia does not contest this conclusion."

On page 17 of his brief, Tom Venezia did just that. (See A-24.) Venezia did contest the district court's conclusion and assigned it as error in the Seventh Circuit.

III

Thomas Venezia had the right to have the extortion and bribery against him enjoined, even if that extortion and bribery were committed by Bonds Robinson, Jr. in his capacity as a federal law enforcement officer.

It has already been shown under the first point that Bonds Robinson, Jr. was not acting as a federal officer when he initiated his extortion/bribery scheme against Venezia in April of 1992. Not even the government would argue that Venezia should be barred from seeking injunctive relief in the state court to enjoin extortion by a corrupt state official, who was not acting in a federal law enforcement capacity. (At least, one would not think that the U.S. Government would advance such an argument.) The next question is, even if Robinson had been acting under authority of the FBI, should he have been allowed to demand a $250 per week bribe? And when Venezia refused to pay, should FBI agent Robinson then have been allowed to seize Venezia's vending machines? The Seventh Circuit says "(t)hese are complex issues", and the court waxes whimsical about whether Tom Venezia "could recover for his loss by bringing suit under the Tucker Act". (See slip opinion, p. 5.) With all due respect, the Seventh Circuit and the U.S. Justice Department in southern Illinois need to become reacquainted with the Bill of Rights. Instead of writing a Kafkaesque analysis about potential litigation under the Tucker Act, the court should have recognized the outrage perpetrated against Tom Venezia, and reminded the government that we have had this rather quaint notion in our Contitutional system since June 21, 1788. We call it the Fifth Amendment and it says: "nor (shall any person) be deprived of life, liberty, or property, without due process of law". Where was Tom Venezia's right to due process when Bonds Robinson, Jr., deprived Venezia of his property, because Venezia wouldn't cough up a weekly bribe of $250.00? Even if Robinson was an FBI operative,

that doesn't give him the right to commit extortion.

That Robinson and his FBI handlers ran a protracted bribery/extortion scam against Thomas Venezia is bad enough. That the Seventh Circuit allowed them to get away with it, and then smeared Venezia with the lie that he had made a "bribe offer on tape" is scary. Most ominous of all however, is that the court of appeals would go to the astonishing length of abolishing the ancient statutory remedy of preliminary injunction in the state of Illinois, in order to keep the government's jackboot on Tom Venezia's throat. This Court should grant its writ of certiorari, and set this manifest injustice right.

IV

Thomas Venezia had the right to engage in the lawful vending business in Belleville, Illinois, without FBI agent Bonds Robinson, Jr. interfering with that lawful business by telling the Belleville Liquor Commissioner that the FBI had a videotape of Thomas Venezia bribing president Bill Clinton.

The mayor of Belleville is also the city's liquor commissioner. During Robinson's testimony in People v. Vogt during July 1993, Robinson testified that in October 1992 (after the preliminary injunction had been issued and while it was still in effect) he (Robinson) had told the mayor that the FBI had videotapes of Tom Venezia passing money to Bill Clinton in Collinsville, Illinois. (See e.g., R. 24, Exh. A, pp. 38-41, 111.) Although Robinson denied it, the implication was that Venezia had passed this money as a bribe to Clinton while Clinton was campaigning in southern Illinois. Robinson also denied that the purpose behind his having told the Belleville liquor commissioner this information was to interfere with Venezia's business. But there could have been no other reason. Now those of us familiar with the mentality of the federal law enforcement apparatus in southern Illinois, would have no doubt that they were videotaping and surveilling Bill Clinton as he campaigned in the area. However, as was asserted in Tom Venezia's pleadings before the district court (see R.15), Tom Venezia has never met Bill Clinton. Robinson was lying to the Belleville liquor

commissioner. And in the telling of the lie, Robinson was violating the injunction which prohibited him from "interfering with Thomas Venezia's business". (See R.2) This is yet another reason why this court should grant certiorari. A citizen ought to be able to conduct his business without malicious lies from the federal government to the local regulators of that business. At the very least, that citizen ought to have the right to go into court and invoke the court's equitable powers in order to stop such misconduct.

V

Thomas Venezia should have had the same right to conduct discovery as every other litigant, the right this court explained in Herbert v. Lando, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979)

Among the many gems in the Seventh Circuit opinion, the court gave us this: "To win the confidence of hoodlums, federal agents sometimes must speak and act like hoodlums." (Slip opinion, p. 5.) But shouldn't Venezia have had the right to show that the real "hoodlum" was Bonds Robinson, Jr.? Shouldn't Venezia have had the right to conduct discovery, to have interrogatories and production demands answered, to depose Bonds Robinson, Jr.? Shouldn't Venezia have had the right to prove that in a credibility contest, Venezia was the honest citizen while Bonds Robinson, Jr. was the consummate liar? The district court denied Venezia these rights, and the Seventh Circuit affirmed. Venezia would have had no way to attack Robinson's credibility, but for the fortunate case of People v. Vogt, 93-CM-2852 (St. Clair County). Because Venezia was no longer protected by the injunction, and because Venezia persisted in his refusal to pay Robinson his bribe/extortion money, Robinson resumed his attack on Venezia's business in 1993. He seized several of Venezia's vending machines from one of Venezia's customers - George Vogt. During a hearing in the Vogt case, which took place on July 23, 27 and 29 of 1993, Vogt's attorney elicited facts from Robinson on cross-examination. This evidence would have been adduced in discovery in the case at bar, but for the fact that the district court refused to allow Venezia to conduct discovery.

Robinson admitted under oath in the Vogt case that he had been fired as a Centreville police officer for raping a prostitute in the back seat of his police car. (See R. 24, Exh. A, p. 107.) It should go without saying that if Venezia could have presented this evidence to the district court, that court would have seen that Robinson had no credibility; and the court would have also seen Robinson's affidavit on removal for what it was - a lie. Also elicited from Robinson during cross-examination at the Vogt hearing was the fact that Robinson was **not** engaged as a federal officer when he initiated his bribery/extortion scheme in April of 1992. If Robinson could have been deposed, Venezia could have shown the district court this fact, and proved that the affidavits on which the removal was predicated were false. Thus if Venezia had not been denied the fundamental right afforded to every other litigant in the United States of America - the right to depose his adversary - Venezia could have shown a clear right to have the case remanded. The Seventh Circuit of course, compounded this error by affirming it, which brings up the next point.

The court of appeals slip opinion at page 6 said: "Venezia served interrogatories and requests for production, seeking to pierce the affidavits (on which the removal to federal court was based). Some of the requests were bizarre. Request 1, for example, reads: 'Produce any and all video-tapes which purport to show Thomas Venezia, and/or Bill Clinton'". The Seventh Circuit would not have considered the request so bizarre however, if Venezia would have been allowed to show through discovery that the FBI had been spreading the lie that it had a videotape of Tom Venezia bribing the president. Now the southern Illinois federal law enforcement people may indeed have video surveillances of Bill Clinton, and they may have video surveillance of Tom Venezia. But unless the tapes have been doctored there is no recording of Venezia and Clinton together, because they've never been together. That was the Catch-22 Venezia found himself in: In order to show that the case should be remanded, Venezia had to pierce the affidavits; in order to do that - i.e. in order to show that the affidavits were false - Venezia had to have discovery. However Venezia was not allowed discovery because his requests were deemed to be bizarre, but of

course that was because Venezia could not adduce evidence through discovery to show that the requests were not bizarre; therefore Venezia was unable to show that the affidavits were indeed false. Could Franz Kafka have concocted a fictional scenario more excruciating than the real-life situation Tom Venezia found himself in?

What should have happened here is not complicated. The Seventh Circuit and the district court should have simply allowed Thomas Venezia the fundamental, basic right to conduct discovery. In Herbert v. Lando, this Court taught:

> "The Court has more than once declared that the deposition-discovery rules are to be accorded a broad and liberal treatment to effect their purpose of adequately informing the litigants in civil trials. Schlagenhauf v. Holder, 379 U.S. 104, 114-115, 85 S.Ct. 234, 241, 13 L.Ed.2d 152 (1964); Hickman v. Taylor, 329 U.S. 495, 501, 507, 67 S.Ct. 385, 388, 391, 91 L.Ed. 451 (1947)." (See 99 S.Ct. at 1649.)

Your Petitioner respectfully asserts that the Seventh Circuit Court of Appeals erred in its judgment that Tom Venezia should have been denied his right to discovery. But for this error, Venezia could have proved that the federal court was without jurisdiction because the affidavits of Robinson and the other federal officers were false.

VI

Judge James Radcliffe of the Illinois State Chancery Court had the jurisdiction and the right to rule on issues properly before him without the U.S. Seventh Circuit Court of Appeals complaining against him to the Illinois Judicial Inquiry Board.

To put the argument under this point in context, it is necessary to revisit part of the argument made under a previous point. The Circuit Court's opinion was riddled with flagrant errors, among which were:

"Between the seizures (of Venezia's vending machines) Bonds Robinson, Jr., one of the agents, sent word to Venezia that he could avoid further interruptions in business by paying graft." (Slip opinion, p. 2) But we know from the record that Robinson did not demand graft "between the seizures". Robinson had started demanding "graft" before April 28, 1992, the date Tom Venezia reported Bonds Robinson's demands for "graft" to Eric Wisette - Robinson's superior. Why would the court of appeals report such a false statement about Tom Venezia?

"During a two hour meeting with Robinson, Venezia promised to buy $250 per week in merchandise from Robinson's wife." (Slip opinion, p. 2) But there is nothing in the record to suggest that Venezia had made such a promise. Robinson never said any such thing. Venezia swore that he did not. This "two-hour" meeting took place on August 17, 1992, and it was recorded on audio tape by Robinson at the FBI's request. The FBI refuses to produce the tape, and the court of appeals didn't have it before them. Why would the court report another false statement about Tom Venezia?

"In other words, Robinson was participating in a sting operation, trying to find out whether Venezia would pay bribes to avoid close supervision by state regulators." (Slip opinion, p. 3) But the record proves that Venezia reported Robinson on April 28, 1992, long before any "sting operation". Why would the court of appeals make this false statement?

"Venezia depicted himself in the state litigation as an honest businessman trying to fend off a crooked state inspector; a less charitable view would be that after getting wind that the FBI had his bribe offer on tape, Venezia tried to put a better light on things by taking the offensive." (Slip opinion, p. 3) But the record proves that Venezia had reported Robinson the first time on April 28, 1992, **one hundred and eleven days before there was any tape to get wind of.** And no one - not even Robinson - has ever alleged that Venezia ever made a "bribe offer". Why would the court of appeals report this false statement about Tom Venezia?

The above statements by the Seventh Circuit Court about Tom Venezia are false, malicious (that is, published with knowledge that the statements were false), and defamatory. Why would the court

say these outrageous things? One wonders whether there is something going on here other than the scholarly resolution of legal issues. Which leads to the argument on this point.

The most incredible and breathtaking and flabbergasting part of the opinion, is the footnote at page 3. The court says that in the way Judge Radcliffe handled the hearing, he "deviated from Illinois law". The court refers to Judge Radcliff's conduct of the hearing as a "parody". But the finding by the Seventh Circuit that Judge Radcliffe engaged in a parody is itself a parody. The Seventh Circuit predicated its finding on the fact that Robinson had not been served with a summons and complaint. Your petitioner spent many pages under Point II of this petition explaining that the statute in the Civil Practice Act (735 ILCS 5/11-02) requires only that "notice" be "given the adverse party", and that notice can be formal, informal, in-person, by mail or telephone, orally or in writing. Robinson was "noticed" in advance of the hearing by serving Robinson with a subpoena, and at the hearing Robinson was handed a copy of the petition. Thus Judge Radcliffe had not "deviated from Illinois law" in any respect. [The Seventh Circuit opinion at page 2 says that Robinson was not permitted to put on a defense. The record proves that statement by the court is false; but more importantly the Seventh Circuit's assertion that a preliminary injunction hearing requires a full litigation on the merits - i.e. "a defense" - shows just how ignorant of Illinois law the court was. See e.g. Wilson v. Wilson, 573 N.E.2d 1323 (1st Dis. 1991).] Based on the faulty premise that Judge Radcliffe had "deviated from Illinois law", the Seventh Circuit "not(ed) apparently inappropriate behavior" by Judge Radcliffe, and unbelievably the court complained against Judge Radcliffe to the Illinois Judicial Inquiry Board. And as if that were not enough, the court published its complaint in the opinion.

One wonders just what ethical turpitude Judge Radcliffe was supposed to have committed, even if he had deviated from Illinois law. More troubling however, is the question of how the case at bar can be squared with U.S. v. Canino, 949 F.2d 928 (7th Cir. 1992), delivered by Judges Manion, Easterbrook and Esbach. (Judge Easterbrook spoke for the court of appeals in the case at bar.) In the

Canino case, the Seventh Circuit described the misconduct of a certain government prosecutor from the U.S. District Attorney's Office in the Southern District of Illinois, which took place during proceedings in E. St. Louis, Illinois (and which, coincidentally, is in St. Clair County, the place where Judge Radcliffe was presiding over the chancery court in 1992). The Canino court reported that the government prosecutor threatened his adversary in a hostile manner, telling the adversary that he was in "serious trouble", that the prosecutor would "get him (the adversary)." These threats constituted the offense of Intimidation (see 720 ILCS 5/12-6) which is a felony punishable by a five year prison term. ("Intimidation" is the term used by the court of appeals to describe the prosecutor's conduct, and that conduct meets the elements of the crime.) Moreover the prosecutor threatened the adversary a second time, warning the lawyer that he (the prosecutor) would break the nose of the lawyer if the lawyer continued to be too zealous in representing his client. This second threat would have been yet another Intimidation felony, punishable by yet another five years in prison. It would also have constituted the crime of Aggravated Assault. The prosecutor also told the lawyer "You are a pussy", and "You have no balls"; both of which were violations of Illinois Supreme Court Rule 752, conduct tending to defeat the administration of justice or tending to bring the legal profession into disrepute, conduct for which Illinois lawyers are routinely disbarred. But all of this was not the first time that the Seventh Circuit Court of Appeals had found this particular government prosecutor to be guilty of misconduct. In U.S. v. Mealy, 851 F.2d 890 (7th Cir. 1988) the court found that this same prosecutor had violated ethical standards, and rebuked him in the opinion.

Nevertheless, this government prosecutor was not reported to the Administrator of the Illinois Attorney Registration and Disciplinary Commission, nor did the panel or the court refer the matter to the district court for disciplinary action. The question arises as to why the court would treat serious misconduct by a government lawyer so cavalierly (see 949 F.2d at 936). Perhaps the Seventh Circuit doesn't believe that government lawyers should be held to the same standards as associate judges in the Illinois courts; or

perhaps the court thinks federal prosecutors should be afforded a certain 'boys will be boys' latitude. A less charitable view would be that there is something going on here, in the instant case; something more than just the court of appeals going about its business of deciding issues of law.

Unfortunately, Tom Venezia doesn't know what that is. But on the other hand, it is not necessary that he know. It is only important that this Court see that the Seventh Circuit Court of Appeals made numerous and profound and prejudicial errors of law, with enormous consequences. These errors effect not only Tom Venezia's rights and property, but they also effect every litigant in Illinois who seeks to invoke the preliminary injunction statute. Moreover Judge Radcliffe - who was only doing his duty and doing it quite properly - finds himself now having to defend against an unknown charge before the Judicial Inquiry Board. If certiorari is not granted, every state judge in Illinois will have to wonder whether he or she might be hauled before the Judicial Inquiry Board, simply because the Seventh Circuit whimsically decides that the state judge has "deviated from Illinois law".

VII
The Seventh Circuit erred in denying Venezia's motion to supplement the record.

The court of appeals affirmed the district court's order which denied Venezia the right to conduct any discovery. Later in People v. Vogt, evidence was adduced which proved: 1) Robinson was not acting as a federal officer at all events involving Venezia. 2) Robinson was fired for raping a prostitute in the back seat of his police car, showing a distinct lack of credibility. 3) The FBI in southern Illinois claims to have a videotape of Tom Venezia passing money to President Clinton, and Robinson has been spreading the lie that Venezia bribed the president. This point has already been argued extensively. Suffice to say that the Seventh Circuit's denial of Venezia's motion to supplement the record was error, especially given the fact that Venezia was never allowed the opportunity to adduce this evidence in discovery.

CONCLUSION

What is a citizen like Tom Venezia to do? He has committed no crime. He has not even been accused of a crime. He reported Bonds Robinson to Robinson's superior on April 28, 1992. When Robinson came back at him even more aggressively several weeks later, Venezia reported Robinson to the State's Attorney of St. Clair County and to the FBI. The State's Attorney and Venezia's lawyer together agreed on a plan to stop Robinson's extortion, and the State's Attorney called Robinson to the courthouse on a pretext. This was done on September 1, 1992, in order to set Robinson up for Venezia's preliminary injunction hearing. Venezia went into court, and meticulously observing the procedures of the Illinois Civil Practice Act, he obtained an injunction which prohibited Robinson from extortion. (And that's all, the injunction simply prohibited that which was illegal in the first place.) What has Venezia gotten in return? The federal police have sicced their police-car rapist on him, seizing his property and threatening his customers. The U.S. Attorney has had Venezia's only protection - the preliminary injunction - dissolved. The Seventh Circuit Court of Appeals has vilified him with lies, and has even made a casualty of the state judge who enjoined the extortion. And in their latest move, the local federal police attacked Tom Venezia in a way that would have made Tomas de Torquemada proud: The CID of the IRS visited him and subpoenaed all his records. (See A-45-47.) When all else fails, a criminal tax investigation might be counted on to come up with something. (Although Venezia produced these records nearly a year ago, so apparently nobody has been able to manufacture any crime from them.)

Tom Venezia is now at the mercy of a rapacious, remorseless, relentless, predatory extortionist. Venezia was stripped of the protection of the Illinois state courts, and the federal courts in Illinois have seen fit to join the federal police juggernaut against him. They've vilified him, seized his property, accused him of bribing the President of the United States, and tried to hound him into a prison pen with manufactured crimes. Along the way, the ancient statutory remedy of preliminary injunction has been abolished in Illinois, and a state judge who only followed the law has been laid out on the rack. The only court left to set this right, the only court left to protect Venezia's rights, is this one. Tom Venezia prays that this Court will issue its writ of certiorari.

AMIEL CUETO (#3126600)
Counsel of Record
for Thomas Venezia

Supreme Court, U.S.
FILED

931929 MAY 31 1994

NO. _____ OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

Term: October, 1993

THOMAS VENEZIA,

Plaintiff-Petitioner,

v.

BONDS ROBINSON, JR.,

Defendant-Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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53pp

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A1-A6	Order of the Seventh Circuit Court of Appeals dated February 9, 1994 from which review is sought.
A7-A15	Order of the U.S. District Court for the S.D. of Ill., Judge William Stiehl filed May 18, 1993.
A16	Order of the Seventh Circuit denying rehearing dated March 2, 1994.
A17-A23	Report to Appropriate Law Enforcement Officials by Attorney for Tom Venezia with exhibits
A24	Page 17 of Plaintiff's Brief in Seventh Circuit
A25-A43	Venezia's Renewed Motion to Supplement the Record on Appeal with Exhibits
A44	Seventh Circuit's order denying Renewed Motion to Supplement Record on Appeal dated February 2, 1994
A45-A47	Subpoena from U.S. Attorney's Office to Venezia dated June 28, 1993
A48	U.S. Constitution Amendment V
A49	28 U.S.C. §1442(a)(1). Federal officers sued or prosecuted
A50	28 U.S.C. §1446 (b). Procedure for removal
A51	735 ILCS 5/11-102. Preliminary injunction

In the

United States Court of Appeals

For the Seventh Circuit

No. 93-2448

THOMAS VENEZIA,

Plaintiff-Appellant,

v.

BONDS ROBINSON, JR.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois, East St. Louis Division.
No. 92-CV-867-WDS—**William D. Stiehl**, *Judge.*

SUBMITTED JANUARY 10, 1994—DECIDED FEBRUARY 9, 1994

Before POSNER, *Chief Judge*, and EASTERBROOK and KANNE, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Thomas Venezia, who runs a vending and amusement business, placed three "video poker" machines with V.F.W. Post 4183 on Scott Air Force Base in Illinois. State agents believed that the machines were being used for gambling. Video games that swallow pocket change and "pay off" in replays are unobjectionable; but if they (or the owners of the establishments) pay winners in cash or liquor, then they violate the law of Illinois. Agents of the Illinois Liquor Control Commission began to enforce regulations to the hilt, visiting the place so often that they became as well known as regular customers. The managers did not take the hint.

In May 1992 state agents raided the Post and seized the three video poker machines. Venezia supplied four more; in August 1992 all four were seized in a second raid. Between the seizures Bonds Robinson, Jr., one of the agents, sent word to Venezia that he could avoid further interruptions in business by paying graft. Venezia says that he pretended to play along in order to ensnare a dishonest agent. During a two-hour meeting with Robinson, Venezia promised to buy $250 per week in merchandise from Robinson's wife. He did not keep this promise and insists that he never meant to; after the second seizure, Robinson sent a message that Venezia had better keep his word if he wanted to avoid additional trouble.

Instead of paying, Venezia filed a suit against Robinson in state court, asking for an injunction against extortion and other vexation. Robinson received a subpoena requiring him to be in court within 15 minutes; he complied, and at 9:30 A.M. on September 1, 1992, the morning the complaint was filed, Judge James Radcliffe of the circuit court in St. Clair County, Illinois, opened a hearing on Venezia's request for injunctive relief. Robinson had not seen a copy of the complaint, had not been served with process, and was not represented by counsel; he asked for time to obtain a lawyer, and the judge denied this request. (The judge would not even give Robinson a minute to use the telephone.) A reluctant Robinson then testified that he had participated in the raids but denied threatening Venezia. By 10:30 A.M. Venezia had completed his case. Without permitting Robinson to put on a defense—and without setting out findings of fact or conclusions of law—the judge immediately signed a preliminary injunction (not a TRO but an order of indefinite duration) tendered by Venezia's lawyer. The injunction barred Robinson from "threatening or coercing" Venezia and his businesses (although they are not parties to the litigation), from "soliciting bribes or acts of extortion", and from "unlawfully seizing the property" of Venezia and his firms. This parody of legal procedure violated so many rules of Illinois

law—not to mention the due process clause of the fourteenth amendment—that it is not worth reciting them.†

Represented by the United States Attorney for the Southern District of Illinois, Robinson removed the action to federal court under 28 U.S.C. §1442(a)(1). This statute permits "[a]ny officer of the United States . . . or person acting under him" to remove a suit instituted to challenge "any act under color of such office" when the defendant's action rests on "authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue." Robinson is not an "officer of the United States"; he is a supervisory agent of the Illinois Liquor Control Commission. But in an affidavit filed with the removal petition, Robinson stated that he was at all pertinent times acting under the direction of agents of the Federal Bureau of Investigation as part of a criminal investigation, and that during the two-hour meeting with Venezia he had been wearing a tape recorder at the federal agents' request. Two agents of the FBI filed affidavits verifying Robinson's claim. In other words, Robinson was participating in a sting operation, trying to find out whether Venezia would pay bribes to avoid close supervision by state regulators. Venezia depicted himself in the state litigation as an honest businessman trying to fend off a crooked state inspector; a less charitable view would be that after getting wind that the FBI had his bribe offer on tape, Venezia tried to put a better light on things by taking the offensive. (Robinson testified in the state court hearing that the meeting had been taped and that the FBI had a copy; the judge also compelled him to answer questions about who he called first (the FBI) on receiving the subpoena; it is most doubt-

† This court routinely sends to the officials responsible for inquiring into the conduct of the bar cases noting apparently inappropriate behavior by lawyers. Similarly, we are sending a copy of this opinion, together with the district court's opinion (which catalogs the extent to which the procedure deviated from Illinois law), to the Judicial Inquiry Board of Illinois.

ful that this discovery into an ongoing criminal investigation was proper, or that it would have occurred had Judge Radcliffe permitted Robinson a legal representative.) At all events, the United States Attorney contended that Robinson is a "person acting under" a federal agent, and that the litigation therefore belongs in federal court.

The district judge denied Venezia's motion to remand, ruling that the affidavits support removal under §1442(a)(1). (Venezia waived any contest to the timeliness of removal by omitting that ground from his motion to remand.) Next the district court vacated the injunction, concluding that many procedural flaws in the notice, hearing, and decision, coupled with the vagueness of the injunction itself, see *Schmidt v. Lessard*, 414 U.S. 473 (1974), prevent its enforcement. Moreover, the court observed, an injunction against law enforcement activity requires special justification, *Reporters Committee for Freedom of the Press v. AT&T*, 593 F.2d 1030, 1065 (D.C. Cir. 1978), which the state judge, who gave no reasons for his order, had not supplied. Finally, the district court dismissed the complaint, because Venezia had not served Robinson with a summons either before or after removal. A subpoena is not a summons, and, the district court concluded, handing the defendant a copy of the complaint in open court (as Venezia's lawyer did on September 1) does not satisfy either state or federal requirements of service. Venezia does not contest this conclusion. A preliminary injunction cannot survive the dismissal of a complaint. *Cypress Barn, Inc. v. Western Electric Co.*, 812 F.2d 1363 (11th Cir. 1987). There remains a dispute, however, about the propriety of the removal.

Section 1442(a)(1) does not permit removal on the federal party's say-so; there must be a bona fide federal defense to the claim based on state law. *Mesa v. California*, 489 U.S. 121 (1989). The three affidavits filed in support of removal state that Robinson was participating in a federal investigation and acted under the instructions of federal agents. Removal then poses two issues: (i) were the affiants telling the truth (that is, was Robinson really act-

ing under the FBI's direction when he did the things about which Venezia complains?); (ii) does federal law authorize criminal investigators to violate state laws prohibiting extortion? No matter what the FBI told him to do, Robinson could not blow up Venezia's warehouse or kidnap his daughter just to find Venezia's breaking point. Even the President of the United States may not excuse his subordinates from the demands of the criminal law. *United States v. Ehrlichman*, 546 F.2d 910 (D.C. Cir. 1976); *United States v. McCord*, 509 F.2d 334, 343 n.16 (D.C. Cir. 1974); cf. *United States v. United States District Court*, 407 U.S. 297 (1972). Courts tolerate much conduct by law enforcement agents that would be criminal if committed by private persons—for example, buying and selling cocaine, or offering bribes to public officials—because the agents lack the intent that is an element of the offense. To win the confidence of hoodlums, federal agents sometimes must speak and act like hoodlums. Cf. *United States v. Murphy*, 768 F.2d 1518, 1528-29 (7th Cir. 1985).

How far this principle extends is an unsettled issue. Could the FBI have sent a team of goons to smash some video poker machines and threaten future thuggery unless Venezia paid bribes, defending its acts with the theory that if Venezia turned out to be an honest entrepreneur he could recover for his loss by bringing a suit under the Tucker Act? These are complex issues, but the propriety of removal does not depend on the answers. Once the federal defendant has a plausible federal defense, removal is appropriate so that the federal court may determine whether the defense succeeds. A federal defendant need not show that he is entitled to *prevail* in order to have access to the federal forum. *Mesa*, 489 U.S. at 133; *Willingham v. Morgan*, 395 U.S. 402, 406-07 (1969). What is more, the state court did not impose a penalty on an isolated bad act; it put the kibosh on an ongoing investigation. A federal agent or informant who asserts that he was (or is) acting in the course of a criminal investigation is entitled to remove under §1442(a)(1), presenting to the federal tribunal all questions of justification and

immunity—both of liability for yesterday's acts and of entitlement to take similar steps tomorrow.

Assuredly, however, the removing party must establish that he *is* a federal official or is "acting under" such an official. Venezia served interrogatories and requests for production, seeking to pierce the affidavits. Some of the demands were bizarre. Request 1, for example, reads: "Produce any and all video-tapes which purport to show Thomas Venezia and/or Bill Clinton and/or Congressman Jerry Costello." None of the affidavits or other documents in the case suggests that President Clinton or Representative Costello had any dealings with Venezia or any evidence pertinent to this affair, or indeed that video recordings played a role in the investigation. (The affidavits mention audio tapes of the Venezia-Robinson meeting.) But the United States Attorney declined to produce any documents or answer any interrogatories, and Venezia contends that the district court's failure to enforce his demands for discovery spoils the decision concerning removal. How could he contest the affidavits, Venezia asks, without discovery? Perhaps he could not. Interrogatories and requests to produce are authorized, however, only after the defendant has been served with process. Fed. R. Civ. P. 33(a), 34(b). Venezia simply ignores the district court's conclusion that Robinson remains unserved—a conclusion that forecloses every avenue of attacking this judgment. The district court was entitled to accept the affidavits at face value, which means that Robinson was entitled to decision in a federal forum.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

THOMAS VENEZIA,	)	
	)	
Plaintiff-Petitioner,	)	
	)	
v.	)	**CAUSE NO. 92-CV-867**
	)	**-WDS**
BONDS ROBINSON, JR.,	)	
	)	
Defendant-Respondent.	)	

MEMORANDUM AND ORDER

STIEHL, CHIEF JUDGE:

Before the Court are defendant's motion to dismiss, and a separate motion to dissolve the preliminary injunction entered in state court.

BACKGROUND

On September 1, 1992, the plaintiff filed a petition for a temporary restraining order, a preliminary, and a permanent injunction, against the defendant in the Circuit Court for the Twentieth Judicial Circuit, St. Clair County, Illinois. On the same morning, at approximately 9:15 a.m., defendant was served with a subpoena to appear before the Honorable James Radcliffe at 9:30 a.m. for an unspecified hearing on the action of "Venezia v. Robinson." Notably, the subpoena did not identify the action by a cause number, but only by that title. In addition, although stamped with the court seal, and signed by a deputy clerk, the subpoena was not dated. On September 1, 1992, at 10:30 a.m., after a hearing, a preliminary injunction was entered by Judge Radcliffe.

The record includes a transcript of the September 1 hearing. Defendant was called as plaintiff's first witness at the hearing. Due to the timing, defendant was not represented by counsel, despite the fact that he twice requested counsel at the hearing (**Tr. 4-5, 22**);

asked for a recess to permit him to use a telephone (**Tr.7**); and to speak privately with the judge. (**TR.22**). Early in the proceedings, the judge gave tacit acknowledgement of the defendant's need for counsel, but never afforded the defendant the opportunity to consult with counsel. ***See*** **TR. 5** (where the judge stated: "Well, based upon the allegations here at some point you may need counsel, Mr. Robinson, but not on this question. Answer it.")

At the time defendant was called to testify at the hearing, he did not have a copy of plaintiff's petition. In fact, plaintiff's counsel was allowed to pose at least fifteen questions to defendant (at which time defendant asked to have counsel present) (**Tr. 4**), and make nine more inquiries, before handing the defendant a copy of the petition (**TR. 6**). Notably, those questions included an inquiry into details about telephone conversations defendant had with FBI Supervisory Special Agent Reginald Joseph after defendant received the witness subpoena on the morning of the hearing.

The verified petition for injunctive relief filed in St. Clair County on September 1, 1992, alleges that the defendant has solicited bribes, committed extortion and threatened to destroy plaintiff's business if the demanded bribes were not paid. At the hearing, the defendant testified that he is employed as a Special Agent for the Illinois Liquor Control Commission. He further testified that his duties include monitoring area bars for compliance with state regulations. Plaintiff introduced evidence that defendant visited the V.F.W. Hall at Scott Air Force Base several times in April of 1992. The manager of the hall testified that defendant harassed him regarding "nitpicking" violations of the liquor laws. Plaintiff introduced evidence that the V.F.W. Hall contains certain vending machines owned by B & H Vending Company, which is owned by plaintiff. There is evidence in the record that in May and August of 1992, defendant participated in raids of the V.F.W. by Illinois State Police during which plaintiff's vending machines were seized.

Plaintiff testified to the following: After the May seizure, defendant began soliciting bribes from him, and plaintiff was told by intermediaries that the seizures of his machines would continue unless he started paying off defendant. Plaintiff, upon his attorney's advice, agreed to meet with the defendant on August 17, 1992.

During the meeting defendant allegedly solicted a bribe, and again on August 25, allegedly demanded that plaintiff pay him $250 a week. Plaintiff testified that although he played along with defendant during the August 17 meeting, pursuant to his attorney's advice, he consistently refused defendant's overtures. After the second raid on the V.F.W. Hall occurred on August 26, 1992, plaintiff testified that he was again told by intermediaries that such action would continue unless he "did business like we discussed."

At the hearing, defendant admitted having the August 17 meeting with plaintiff, but denied that he solicited a bribe. Defendant testified that he and plaintiff discussed plaintiff buying nylons from his wife as a means of "legitimately" paying him $250 per week. Defendant also admitted informing plaintiff through intermediaries that the August 26 raid occurred because he failed to live up to his obligations. Defendant testified that he was also working for the FBI at the time, that he was wearing a recording device during the meeting, and that his activities were not undertaken for the purpose of soliciting a bribe, but were part of an "ongoing investigation."

At the end of plaintiff's evidence, the judge issued the following preliminary injunction, without an expiration date, or a bond, as prepared by plaintiff's counsel:

> Upon verified petition and for good cause shown, this Court issues its Preliminary Injunction, enjoining and restraining Bonds Robinson, Jr. from threatening or coercing Thomas Venezia or any employee of Ace Music or B & H Vending; that Bonds Robinson, Jr. is enjoined and restrained from soliciting bribes or acts of extortion; that Bonds Robinson, Jr. is enjoined and restrained from unlawfully interfering with Thomas Venezia's business and/or from unlawfully seizing the property of Thomas Venezia, Ace Music or B & H Vending.

Remarkably, defendant was not given an opportunity to present any evidence before the judge entered the injunction.

As stated earlier, the record reveals that plaintiff's counsel

handed a copy of the petition to the defendant during the September 1, 1992 hearing. That petition is identified as bearing Cause Number 92-CH-299. Although plaintiff's counsel stated that he was "serving" the defendant "at this time" with the pleading, there is nothing in the record to indicate that defendant was ever served with summons on the petition, nor is there any evidence in the record of a return having been made.

DISCUSSION

In Illinois, the issuance of a temporary restraining order and preliminary injunction is governed by **735 ICLS 5/11-101, 5/11-102. Section 101** provides in part:

> Every order granting an injunction and every restraining order shall set forth the reasons for its entry; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties...who receive actual notice of the order by personal service or otherwise.

(formerly Ill. Rev. Stat. ch. 110, ¶ 11-101).

Illinois courts have held that due to the extraordinary nature of the remedy, a preliminary injunction should be granted "only pursuant to the utmost care and should not issue unless the need is clear." ***Hough v. Weber*, 560 N.E.2d 5, 13 (Ill. App), *leave to appeal denied*, 564 N.E.2d 8937 (Ill. 1990).** In Illinois, "[a] complaint for preliminary injunction must plead facts which clearly establish a right to injunctive relief, and allegations consisting of mere opinion, conclusion or belief are not sufficient to support issuance of the writ." ***Id.*** The Illinois courts have set forth a five-part test for injunctive relief:

> In order to establish entitlement to preliminary injunctive relief, the plaintiff must demonstrate that (1) [he] possesses a certain and clearly ascertained

> right which needs protection; (2) [he] will suffer irreparable harm without the protection of the injunction; (3) there is no adequate remedy at law for [his] injuries; (4) there is a substantial likelihood of success on the merits; and (5) in the absence of preliminary relief, [he] would suffer greater harm without the injunction than defendants will suffer if it is issued.

Id. citing Mister v. A.R.K. Partnership*, 553 N.E.2d 1152, 1155 (Ill. App.), *leave to appeal denied, 561 N.E.2d 694 (1990).

In this case, there is the added complexity that the injunction involves an ongoing federal investigation. In ***Reporters Committee for Freedom of the Press v. American Tel. & Tel. Co.*, 593 F.2d 1030, 1065 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949 (1979)**, the District of Columbia Circuit discussed the issue of injunctive relief vis a vis a criminal investigation:

> A party invoking equitable intervention in the criminal investigative process has a particularly heavy burden. Only the most extraordinary circumstances warrant anticipatory judicial involvement in criminal investigations. Even where federalism concerns are absent, the fundamental concept of separation of powers dictates judicial restraint. The powers of criminal investigation are committed to the Executive branch. The balance between the Executive and Judical branches would be profoundly upset if the Judiciary assumed superintendence over the law enforcement activities of the Executive branch upon nothing more than a vague fear or suspicion that it officers will be unfaithful to their oaths or unequal to their responsibility.

As applied to the facts in this case, the ***Reporters*** decision indicates that, to succeed on his claim for injunctive relief, plaintiff

must show: (1) that there is an imminent threat that the defendant will continue seizing his machines in a bad faith attempt to extort bribes; (2) that such activity will cause him substantial and irreparable harm; and (3) that his remedy at law is inadequate.

In this case, the state court made no specific findings as to any of the elements necessary to support a claim for injunctive relief. Rather the court made only general, boilerplate findings. The court stated:

> Let the record reflect based upon the testimony presented and based upon the verified petition, the Court finds that the petitioner will suffer irreparable harm and that he has no adequate remedy at law, and that as a matter of law based upon the testimony the Court will enter a preliminary injunction.

In support of his motions, defendant submitted affidavits by Larry M. Skora and Reginald J. Joseph. In their affidavits, Skora and Joseph state that they are Agents with the FBI, that defendant's actions during the August 17 meeting were undertaken at their direction, and that they instructed defendant as to the content of the conversation. Skora and Joseph further stated that the activities were part of an active and ongoing federal criminal investigation over which they have supervisory control.

Although defendant referred to his affiliation with the FBI during the September 1 hearing, he was clearly reluctant to do so. At no time did he testify that the August 17 meeting was undertaken at the direction of, and that its contents were controlled by, his supervisors at the FBI as part of an ongoing criminal investigation. As previously discussed, defendant was served with the subpoena requiring his appearance only fifteen minutes before the hearing began. He was provided no advance notice of the nature of plaintiff's allegations and no opportunity to consult an attorney. His repeated requests to speak with counsel no doubt reflect an uncertainty as to the specificity with which he could discuss the FBI investigation. Under such circumstances, reconsideration of the decision to grant the preliminary injunction based upon new

evidence is appropriate. ***Milwaukee County Pavers Ass'n v. Fiedler,* 710 F. Supp. 1532, 1534-35 (W.D. Wis. 1989).** Considering the entire record, the Court cannot find that there is any basis for continuing the injunction entered in state court as that injunction was singularly lacking in any specific findings. **735 ICLK 5/11-101; *Hough,* 560 N.E.2d at 13-16.**

In addition, the Court cannot find that the defendant received notice of the preliminary injunction hearing as required by **5/11-102. Section 5/11-102** provides that "[n]o court or judge shall grant a preliminary injunction without previous notice of the time and place of the applications having been given the adverse party." The subpoena handed to the defendant some fifteen minutes before the hearing was silent as to the nature of the hearing. The defendant did not receive a copy of the petition until after the commencement of the hearing, while he was on the stand. There is no indication in the transcript of the hearing that defendant was given any time to even read the petition. The court finds, therefore, that this preliminary injunction is more in the form of a temporary restraining order, issued without notice and without bond, which would have expired within ten days of issuance. ***See* 5/11-101.**

The Court finds, therefore, in light of the lack of specific findings and lack of notice to the defendant, that defendant's motion to dissolve the preliminary injunction is well taken, and **DISSOLVES** the preliminary injunction entered September 1, 1992 against the defendant.

Remaining before the Court is plaintiff's petition for a permanent injunction. The record indicates plaintiff never served the defendant with summons on the complaint in accordance with the requirements of **Ill. S.Ct. Rule 101,** nor was a return made as required by **Rule 102(d).** Plaintiff asserts that defendant was properly served when he was handed a copy of the petition during the hearing. Plaintiff attempts to pass the burden of establishing a lack of service to the defendant. The burden, however, remains with the plaintiff to establish jurisdiction. Illinois courts have long recognized that service of process, including service of summons, is a prerequisite to obtaining jurisdiction over the person. "Absent a general appearance, personal jurisdiction can be acquired only by

service of process in the manner directed by statute." ***State Bank of Zurich v. Thill*, 497 N.E.2d 1156, 1161 (Ill. 1986) (citations omitted).** ***See also Miller v. Town of Cicero*, 590 N.E.2d 490, 493 (Ill App. 1992).** "Generally, a judgement rendered without service of process, where there has been neither a waiver of process nor a general appearance by the defendant, is void regardless of whether the defendant had actual knowledge of the proceedings." ***Schorsch v. Fireside Chrysler-Plymouth*, 527 N.E.2d 693, 699 (Ill. App.), *leave to appeal denied*, 535 N.E.2d 411 (1988); *see also Charter Bank & Trust of Ill. v Novak*, 578 N.E.2d 629, 631 (Ill. App. 1991).** The lack of summons, and a return thereon, is not a mere technicality, it is a jurisdiction bar. "If a defendant has not been served properly and has not appeared to defend in the cause, an order entered against [him] in the proceeding, is void *ab initio* regardless of whether [he] had actual knowledge of the proceeding." **578 N.E.2d at 631.** "Jurisdiction over a person cannot be had by serving him with a notice; a court acquires jurisdiction over a person only after proper service of summons." ***Augsburg v. Frank's Car Wash, Inc.*, 431 N.E.2d 58, 61 (Ill. App. 1982), *leave to appeal denied.***

"The objectives of service of process are: (1) to notify the defendant of pending litigation and enable him to appear and defend and (2) to vest jurisdiction in the trying court." ***Novak*, 578 N.E.2d at 631.** A party seeking to assert jurisdiction over another bears the burden of establishing that all the jurisdictional prerequisites have been satisfied. The court never presumes that jurisdiction exists.

The Court finds that plaintiff has failed to establish that this Court has jurisdiction over the defendant. The issue of insufficient service of summons was clearly raised by the defendant in his motion to dismiss. If plaintiff had properly served the defendant, he needed only to attach a copy of the summons and return to his response. Plaintiff has made no effort to do so. Furthermore, the defendant's forced appearance and testimony at the September 1st hearing did not constitute a waiver of service, nor can it be said that his appearance constituted a general appearance.

Moreover, the plaintiff has not advanced any reason why he has

failed to comply with either **Fed. R.Civ. P. 4(j)** or **Ill. S.Ct. Rule 103(b)** as to service of summons, and, indeed, cannot. Plaintiff's petition was filed September 1, 1992; plaintiff subpoenaed defendant into court and examined him under oath that very day, so defendant was available to plaintiff for service. Clearly more than 120 days have elapsed since the petition was filed on September 1, 1992, and, in fact, since it was removed to this Court on November 23, 1992. Once the action was properly removed to this Court, any procedural or service defects should have been cured under the appropriate rule of federal civil procedure. ***See* Fed. R. Civ. P. 81(c); Rule 4.** The procedural defects in this case are substantial, and plaintiff has not attempted to cure them. That failure results in a lack of jurisdiction over the defendant.

The Court, therefore, finds that defendant's motion to dismiss for lack of personal jurisdiction is well-taken. Having made this determination, it is not necessary for the Court to reach defendant's second ground for dismissal, e.g. that the doctrine of sovereign immunity bars any court from entertaining plaintiff's claim.

Accordingly, the Court **GRANTS** defendant's motion to dismiss, and plaintiff's action is **DISMISSED** for lack of jurisdiction. Defendant's motion to dissolve preliminary injunction is **GRANTED,** and the preliminary injunction issued by the Circuit Court for the Twentieth Judicial Circuit, St. Clair County, Illinois is **DISSOLVED.** Defendant's motion to strike, and plaintiff's motion to compel are **DENIED** as moot.

IT IS SO ORDERED.

DATED: 18 MAY, 1993

WILLIAM D. STIEHL
CHIEF JUDGE

MAY 18, 1993

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

March 2, 1994.

Before

Hon. RICHARD A. POSNER, Chief Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

THOMAS VENEZIA,
Plaintiff-Appellant,

No. 93-2448 V.

BONDS ROBINSON, JR.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Illinois, East St. Louis Division.

No. 92-CV-867-WDS
William D. Stiehl, Judge

Order

Plaintiff-Appellant filed a petition for rehearing en banc on February 17, 1994, which has been construed as a petition for rehearing and suggestion of rehearing en banc. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

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October 28, 1992

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REPORT TO APPROPRIATE LAW ENFORCEMENT OFFICERS BY ATTORNEY FOR THOMAS VENEZIA

Gentlemen:

This concerns the case of Thomas Venezia v. Bonds Robinson, Jr., 92-CH-299, pending in St. Clair County, Illinois, attached, please find the following: 1) Petition for TRO, Preliminary Injunction, and Permanent Injunction; 2) Preliminary Injunction; 3) Transcript of hearing which took place on September 1, 1992; 4) Petition for Rule to Show Cause; 5) Telephone bill from the law offices of Cueto, Cueto, & Cueto, Ltd., verifying telephone

call to Eric Wisette, who is the superior of Bonds Robinson, Jr.; and 6) Statements of John T. White and James and Dorothy McCaw.

I will try to explain as succinctly as I can what I believe the relevant facts of this case to be. I believe this statement of facts is supported by the attachments to this letter. Last spring Bonds Robinson, Jr. a state liquor control agent, began harassing the people at VFW Post 4183 in Shiloh, Illinois. He knew that the vending machines at the Hall were leased or rented from Ace Music Company, a company owned by Tom Venezia. Mr. Robinson let it be known that if Mr. Venezia would pay him off, he would stop harassing Mr. Venezia's customers.

On April 28, 1992, at 11:55 a.m. my law partner, Thomas Daley called Eric Wisette in Chicago, who is Mr. Robinson's superior. (See copy of our telephone bill, attached hereto.) Mr. Daley reported to Mr. Wisette that Mr. Robinson was harassing Mr. Venezia's customers, and that Mr. Robinson was "making noises" like he (Mr. Robinson) was soliciting a bribe. Mr. Wisette said that it wouldn't surprise him if Mr. Robinson were soliciting bribes. Mr. Wisette was very angry with Mr. Robinson and promised Mr. Daley that he (Mr. Wisette) would put a stop to Mr. Robinson's misconduct.

Nothing happened (that I know of) for several months. Then, as the pleadings attached hereto indicate, Mr. Robinson started again to attempt to extort bribes from Mr. Venezia. The facts of this second attempt are laid out in the pleadings and in the transcript attached hereto. It is my opinion or conclusion (but I have no way of knowing), that after Mr. Robinson was told by Mr. Wisette that he had been reported for extortion and bribery, that he (Mr. Robinson) went to the FBI for one (or both) of two purposes: 1) Either Robinsion wanted to cover himself; or 2) He wanted to continue to try to extort bribes while acting as an undercover agent for the FBI.

On September 1, 1992, the court enjoined Mr. Robinson from interfering with Mr. Venezia's business. This past Monday and Tuesday (October 19 and 20, 1992) Mr. Robinson has violated the court order several times. (See attached statements). He is

back to interfering with Mr. Venezia's business. Mr. Robison is again apparently threatening Mr. Venezia's customers; he is telling them that in doing business with Mr. Venezia, they are doing business with a "criminal organization". Mr. Robinsion is threatening (either expressly or by implication) to shut them down unless they stop doing business with Tom Venezia.

I will be asking for a hearing soon, in order to see whether I can get the court to hold Mr. Robinson in contempt. I also plan to take full advantage of all civil remedies available to my client. Because of Mr. Robinson's conduct, Mr. Venezia has suffered special damages of more than a million dollars (that is business losses in the past, along with the present cash value of those losses reasonably certain to occur in the future). I plan to file suit on Mr. Venezia's behalf against Mr. Robinson for Tortious Interference with a Contract, which - if the plaintiff prevails - will make Mr. Robinson liable not only for the million dollar-plus in actual damages, but punitive damages are available as well. I also plan to sue for Mr. Venezia under the civil provisions of RICO. The "enterprise" will be the state Liquor Control Commission (that is so that the plaintiff will have a deep pocket to pay the treble damages and attorney's fees). The suit will allege that the pattern of racketeering activity is the set of numerous predicate offenses of extortion and bribery.

The purpose of this letter however, is not to explain the civil remedies we will pursue, but to ask you gentlemen to please investigate the activities of Mr. Robinson. Mr. Venezia is an honest citizen engaged in a lawful business. This relentless attack by Mr. Robinson - who claims to be operating under the cloak of law enforcement - is a brutal ourtrage. Mr. Venezia (through Tom Daley) first reported these extortion and bribe attempts last April 28, 1992. That didn't stop Mr. Robinson. Then Mr. Venezia reportged to the State's Attorney and to the FBI on August 28, 1992. On September 1, 1992 a preliminary injunction was issued against Robinson. But nothing works.

As at least two of you gentlemen know, I am a former military policeman, a former police officer and detective (five years on the St. Louis P.D.), and a former prosecutor. Although Mr.

Robinson has claimed that he is working as a surrogate for the FBI, I cannot believe that. I know from my own experience that the FBI would never allow one of its people to commit extortion, to demand bribes, to shut down an innocent citizen's lawful business. Tom Venezia has not been charged with an offense, let alone convicted. He has reported to the authorities as a citizen should. Indeed this is the third report (the first was on Apirl 28, 1992 to Eric Wisette, the second was on August 28, 1992 to Mr. Haida and the FBI). This is like something out of a Kafka novel. Mr. Venezia is being driven out of business by a law enforcement officer who claims he is also a federal agent. Notwithstanding our report six months ago and our reports two months ago, Mr. Robinson has not been stopped. We will zealously pursue all of our civil remedies, every one on them. But a contempt citation and a damages verdict - even a large one - are not adequate to compensate Mr. Venezia if Mr. Robinson succeeds in permanently destroying his livelihood.

Very truly yours,
CUETO, CUETO & CUETO, LTD.

AMIEL CUETO

My name is James McCaw and I live at 312 East Jefferson, O'Fallon Ill. My date of birth is 3-23-27. I am giving this statement to Bob Romanik of my own free will.

On Monday, October 19th, 1992, I was outside of the Outdoorsman's Lounge at 125 East 1st St., O'Fallon Ill., doing some work in the alley when my wife, Dorothy came out of the lounge, very upset, and told me that she was going to have to go to the police station and she was worried and upset that she was going to be arrested. I came into the lounge through the back entrance and then a man came to the back and identified himself as Bonds Robinson, a State Liquor Agent. He told me that my wife had did the right thing in cooperating with him because now the state police, television cameras and everyone else would not be involved. Bonds Robinson then told me to disassociate myself with organized crime and that the vending company that I was doing business with was organized crime. He then stated that these organized guys drive around in $30,000 cars. He then told me these people, if they get a foothold, they are hard to get rid of. He said I was better off to disassociate with these people.

I have given this statement to Bob Romanik of my own free will and find this statement correct and true to the best of my knowledge.

x James McCaw

This statement was taken on Thursday, October 22, 1992 at the Outdoorsman's Lounge, 125 East 1st St., O'Fallon, Ill. at approximately 10:20 a.m.

Bob Romanik

My name is Dorothy McCaw and I live at 312 East Jefferson, O'Fallon, Ill. My date of birth is 12-15-39. I am giving this statement to Bob Romanik of my own free will.

On Monday, October 19, 1992, I was getting off work at the Outdoorsman's Lounge at 125 East 1st St., O'Fallon, Ill. at ap-

proximately 10:00 a.m. when a person who identified himself as Bonds Robinson, a liquor control agent come into the lounge and checked the bottles and licenses and then went back to the storage area and noticed a cash box and requested to look inside. I didn't want him to look inside because I didn't think it was anyone's business but I let him look inside because he acted like he had the authority to do this. Sometime after that, he told me that maybe I should get rid of the machines because you are dealing with organized crime and if they, meaning organized crime, get a foothold, it will be hard to get rid of them. He them told me that I didn't want to take the chance of losing my license and if I cooperated, I would not have to worry about the State Police and the television cameras giving the lounge bad publicity. Bonds Robinson then had me write a statement saying I paid off on the machines and then I wrote what he told me to write down. I did not totally agree with what I was writing down but I was so nervous. I just put down whatever he told me to.

I have given this statement to Bob Romanik of my own free will and find this statement correct and true to the best of my knowledge.

x Dorothy McCaw
x Bob Romanik

This statement was taken on Thursday, October 22, 1992 at the Outdoorsman's Lounge, 125 East 1st St., O'Fallon, Ill. at approximately 10:35 a.m.

x Bob Romanik

My name is John T. White, I live at 110 East 3rd St. (rear), O'Fallon, Illinois. My date of birth is 07-26-27. I have agreed to be interviewed by Bob Romanik at the Knights of Columbus #4239, O'Fallon, Ill. on Wednesday, October 21, 1992 at approximately 12:05 p.m.

Bonds Robinson, a state liquor investigator came to the O'Fallon, Ill. Knights of Columbus on Monday, October 19, 1992 at about 3:30 p.m. and after checking the licenses and bottles and then asked to see the daily receipts. I thought he had the right to

see the daily receipts so I showed them to him. He looked through the daily receipts and kept three receipts. I then ask Bonds Robinson what would happen now. He then told me that I was going to be arrested and that I needed one thousand dollars bond. Bonds Robinson then told me that I better get the machines out or face the risk of seeing the state police and the television cameras. At this point, I felt threatened by his comments.

I, John T. White have given this statement to Bob Romanik, of my own free will and find this statement correct and true to the best of my knowledge.

x John White
x Bob Romanik

For if the district court lacked subject matter jurisdiction, its order dissolving the preliminary injunction is a nullity. American Policyholders Inc. Co. v. Nyacal Products, Inc., 989 F.2d 1256 (6th Cir. 1993) Even if the district court had jurisdiction, the dissolution of the prelimary injunction was rank error.

(A) Bond Robinson, Jr. was given proper statutory notice

The notice required to be given an adverse party to an application for a preliminary injunction in the state of Illinois is governed by 735 ILCS 5/11-102, which provides as follows:

> "No court or judge shall grant a preliminary injunction without previous notice of the time and place of the application having been given the adverse party."

The subpoena provided Bonds Robinson, Jr. prior to the state court hearing clearly notified Robinson of the "time and place" of the hearing. No further notice is required. Moreover Robinson was served with a copy of Venezia's petition for a preliminary injunction before the hearing began. The district court's conclusion that Robinson was improperly notified of the time and place of the hearing was error, notwithstanding that the court had no jurisdiction over the subject matter in the first place.

No. 93-2448

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

THOMAS VENEZIA,	) On Appeal from the U.S. District
	) Court for the Southern District
Plaintiff-Appellant,	) of Illinois
	)
v.	) No. 92-CV-867-WDS
	)
BONDS ROBINSON, JR.,	) Honorable William Stiehl
	) Judge Presiding
Defendant-Appellee.	)

RENEWED MOTION TO SUPPLEMENT THE RECORD ON APPEAL

Comes now plaintiff, Thomas Venezia, by and through his attorneys, Cueto, Cueto & Cueto, Ltd., and pursuant to the Federal Rules of Appellate Procedure 10(e) states:

1. The plaintiff-appellant previously filed a motion to supplement the record with the materials attached thereto as Exhibits A and B. This court of appeals denied the motion without prejudice, holding that the motion must first be presented to the district court. (See Exhibit 1) The appellant made such a motion in the district court and was denied the relief requested. (Exhibit 2)

2. This cause originated in Illinois state court on September 1, 1992 when the appellant-petitioner, Thomas Venezia, filed a petition for temporary restraining order, preliminary injunction, and permanent injunction against Bonds Robinson, Jr. Venezia sought to enjoin Robinson, an agent of the Illinois Liquor Control Commission, from soliciting bribes.

3. On November 23, 1992, the cause was removed to federal court, the Honorable William Stiehl presiding. The basis for

removal was that Robinson was, pursuant to 28 U.S. C. §1441 (a) (1), allegedly a federal officer or a person acting under a federal officer.

4. On May 18, 1993, the district court granted Robinson's motion to dismiss and denied Venezia's motion to compel discovery, including discovery aimed at Robinson's status, as being moot.

5. A notice of appeal to the Seventh Circuit was filed on June 14, 1993 and the appellate process began.

6. On July 27, 1993, the sworn testimony of Bonds Robinson, Jr. was offered in Illinois state court in the matter of People v. Vogt, 93-CM-2852. Like the instant action, the Vogt state court action dealt with Robinson's seizure of Venezia property. A copy of the Vogt transcripts relevant to this proceeding are attached hereto as Exhibit A.

7. Robinson's sworn testimony in the Vogt matter is relevant to the issues raised in this lawsuit as it demonstrates that during the crucial period of time that Robinson was soliciting bribes from Venezia he was not acting as a federal officer pursuant to 28 U.S. C. §1442 (a) (1). For example, Robinson was asked the following questions and replied, under oath, as follows:

> "Q. Now, before, on April the 28th of 1992 or before, were you engaged in a criminal investigation of Tom Venezia on behalf of the Federal Bureau of Investigation?
>
> A. No."
>
> (See Exhibit A page 30)
>
> . . .
>
> "Q. Okay. And when did that -- and you've already testified, by the way, that that was -- you had not been engaged in such an investigation before April the 28th of 1992. So we know that that investigation that you're talking about began on April or some time after April 28th of 1992 but before September 1st of 1992; is that correct?
>
> A. Yes, sir."
>
> "Q. How soon after the April 28th date, the date that Tom Daley called to report to your supervisor, how soon after that did the investigation begin?

A. I don't remember the exact day.

Q. I didn't ask you the exact day. I said how soon after Tom Daley reported that you were trying to solicit bribes did you begin the investigation on behalf of the FBI?

A. I don't remember.

Q. Well, let's try it this way. Was it a matter of days, weeks or months?

A. Had to be maybe weeks."

(See page 32 of Robinson's testimony in People v. Vogt, 93 CM 2582 attached hereto as Exhibit A.)

"Q. These stories that you told Mayor Brauer, and I've already been over them several times, they have to do with Tom Venezia at a meeting with Bill Clinton. They have to do with the videotape of the Democratic National Convention where Tom Venezia appears and Bill Clinton is either on this tape or he's on the tape somewhere because he was there. All these stories that you related to Mayor Brauer in October of 1992, you say you did that as purely professional?

A. Yes

Q. Is that correct?

A. Yes, sir."

(See page 93 of Robinson's testimony in People v. Vogt, 93 CM 2582 attached hereto as Exhibit A.)

. . .

"Q. What was he doing at this convention on the videotape?

A. I have no idea.

Q. Whom did you hear that from?

A. I heard that from the FBI

Q. Who in the FBI told you that?

A. I believe one of the agents we had talked about.

Q. Which agent?

A. At this time, I do not know. It was something I was not privied to."

(See page 96 of Robinson's testimony in People v. Vogt, 93 CM 2582 attached hereto as Exhibit A.)

8. The sworn testimony of Robinson in the Vogt matter proves that Bonds Robinson, Jr. was not working in any capacity as a federal officer on April 28, 1992, or before and, in fact, any work by Robinson in a federal capacity did not begin until many weeks after April 28, 1992. At the hearing before the Honorable James Radcliffe in state court, the evidence of bribery and extortion by Robinson on or before April 28, 1992 was established and it was this bribery and extortion that the state court enjoined. Thus, Robinson's sworn testimony in Vogt demonstrates irrefutably that he was not a federal agent and, therefore, there can be no basis for federal subject matter jurisdiction or a basis for removal under 28 U.S.C §1441 (a) (1).

Furthermore, it is significant to note that in the Vogt case all charges were dropped when the Illinois Liquor Commission, Robinson's true employer, did not disclose all of the materials they were ordered to produce. The State's Attorney of St. Clair County was forced to dismiss all charges and, thereafter, initiated an investigation into Robinson. See Editorial Viewpoint of the Belleville News Democrat attached hereto as Exhibit B.

9. The materials now sought to be included in this record on appeal were not included originally because by the time Robinson testified in Vogt, Judge Stiehl had dismissed this cause and disallowed any and all discovery. Therefore, no fault or omission of the plaintiff lies behind the failure to include these relevant materials in the trial record.

10. In denying this motion to supplement the record on appeal, the district court's reliance upon United States v.Hillsberg, 812 F.2d 328 (7th Cir. 1987), was misplaced. In Hillsberg, a criminal case, the district court and Seventh Circuit declined to modify the appellate record by including an affidavit of the defendant's trial counsel relating alleged conversations with jurors following their verdict. This material was not made part of the record because the Seventh Circuit did not wish to open the Pandora's box of allowing an attack upon jurors' mental processes and because the affidavit's information would not have affected the outcome of the appeal. Hillsberg, 812 F.2d at 336-337.

11. Neither of these concerns are raised by the present motion

and materials. The proposed materials do not attack the mental processes of a jury as no jury verdict is at issue. Furthermore, the materials here, unlike those in Hillsberg, are directly relevant to this court's subject matter jurisdiction over this civil case.

The subject matter jurisdiction of the federal courts to entertain civil actions is jealously guarded. Indeed, "the federal courts are obliged to police the constitutional and statutory limitations on their jurisdiction. That is why, even at the appellate level, the court must satisfy itself that there is federal jurisdiction over the case." Kanzelberger v. Kanzelberger, 782 F.2d 774 at 777, (7th Cir. 1986)

Kanzelberger is instructive on this point. In Kanzelberger, the Seventh Circuit, on its own initiative and relying upon matters not originally in the trial record, held that federal subject matter jurisdiction did not exist and a verdict which was the result of two and a half years of active litigation was regrettably overturned. The entire matter was remanded to state court because there was "no doubt that the case is not within the jurisdiction of the federal courts." Kanzelberger, 782 F2d at 779.

A similar result should apply here. In the present case, as in Kanzelberger, the materials at issue raise serious questions as to Robinson's "federal status," which cannot be ignored if this court is to seriously undertake its jurisdictional analysis.

WHEREFORE, because the sworn testimony of Bonds Robinson, Jr. in People v. Vogt, 93 CM 2582, marked as Exhibit A, is relevant to the fundamental issue of federal subject matter jurisdiction and the editorial viewpoint of the Belleville News Democrat dated Sunday, August 19, 1993, marked as Exhibit B, is also relevant, the plaintiff-appellant Thomas Venezia moves that they be included in the record on appeal. Further, after the inclusion of these materials, the plaintiff-appellant requests ten days to submit further argument based upon these materials.

CHRISTOPHER CUETO #06192248
Attorney for Plaintiff-Appellant

CUETO, CUETO & CUETO, LTD.
Attorneys at Law
7110 West Main St.
Belleville, IL 62223
618-277-1554

United States Courts of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Date: November 3, 1993

By the Court:

No. 93-2448

THOMAS VENEZIA,
Plaintiff - Appellant

V.

BONDS ROBINSON, JR.,
Defendant - Appellee.

Appeal from the United States District Court for the
Southern District of Illinois, East St. Louis Division
No. 92 C 967, William D. Stiehl, Judge

This matter comes before the court on considersation of the following documents:

1. "DEFENDANT-APPELLEE'S MOTION TO STRIKE PAGES ONE THROUGH FIVE AND SEVEN THROUGH NINE AND THE APPENDIX OF PLAINTIFF-APPELLANT'S REPLY BRIEF; OR ALTERNATIVELY MOTION FOR LEAVE TO FILE SURREPLY" filed herein on 10/18/93, by counsel.
2. "MOTION TO SUPPLEMENT THE RECORD" filed herein on 10/21/93, by counsel for appellant.
3. "OBJECTION TO DEFENDANT-APPELLEE'S MOTION TO STRIKE PAGES ONE THROUGH FIVE AND SEVEN THROUGH NINE AND THE

APPENDIX OF PLAINTIFF-APPELLANT'S REPLY BRIEF; OR ALTENATIVELY MOTION FOR LEAVE TO FILE SURREPLY" filed herein on 10/21/93 by counsel.

4. "MEMORANDUM IN OPPOSTIION TO MOTION TO SUPPLEMENT THE RECORD" filed herein on 10/29/93, by counsel for appellee.

On consideration thereof,

IT IS ORDERED that the MOTION TO STRIKE PAGES ONE THROUGH FIVE AND SEVEN THROUGH NINE AND THE APPENDIX OF THE PLAINTIFF-APPELLANT'S REPLY BRIED is GRANTED. The appellant shall withdraw the brief and appendix, make the necessary deletions, and refile the brief and appendix by 11/11/93. The MOTION TO SUPPLEMENT THE RECORD is DENIED without prejudice. Appellant must move the district court in the first instance.

NOTE: The parties are advised that Rule 26(c), Federal Rules of Appellate Procedure, which allows for three additional days after service by mail, shall not apply when the due dates of briefs are specifically set by order of this court. All briefs are due by the dates ordered.

(1026-102693)

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

THOMAS VENEZIA,	)	
	)	
Plaintiff-Petitioner,	)	
	)	
v.	)	CAUSE NO. 92-CV-867-WDS
	)	
BONDS ROBINSON, JR.,	)	
	)	
Defendant-Respondent	)	

MEMORANDUM AND ORDER

STIEHL, District Judge:

This matter is before the Court on plaintiff's motion to supplement the record on appeal. The defendant has filed an objection to this motion. Plaintiff seeks, pursuant to **Fed. R. App. P 10(e),** to include in the record on appeal an editorial from the Belleville News Democrat on August 29, 1993, and the defendant's testimony from a July 27, 1993 hearing in the Circuit Court for the Twentieth Judicial Circuit, St. Clair County, Illinois, on a motion to suppress in an unrelated state criminal case, ***People v. Vogt,*** **93-CM-2582.** Plaintiff asserts that the additional materials are relevant to the question of this Court's jurisdiction.

On September 1, 1992, plaintiff commenced his action against the defendant by filing a petition for temporary restraining order, preliminary injunction, and permanent injunction in the Circuit Court of St. Clair County, Illinois, in ***Venezia v. Robinson,*** **Cause No. 92-CH-299.** On the same morning at 10:30 A.M. the state court issued a preliminary injunction against the defendant

> enjoining and restraining Bonds Robinson, Jr. from threatening or coercing Thomas Venezia . . . : that Bonds Robinson, Jr., is enjoined and restrained from soliciting bribes or acts of extortion; that Bonds Robinson, Jr., is enjoined and restrained from unlawfully interfering with

EXHIBIT 2

Thomas Venezia's business and/or from unlawfully seizing the property of Thomas Venezia, Ace Music or B & H Vending.

On April 2, 1993, this Court denied plaintiff's motion to remand, finding jurisdiction under **28 U.S.C. § 1442(a)(1),** because at all relevant times the defendant was an officer of the United States, or a person acting under him in an ongoing criminal investigation. The Court subsequently granted the defendant's motion to dismiss. In that Order the Court made an extensive review of the record. Both of the items which plaintiff seeks to add to the record post-date the Court's Orders, and were, therefore, not before the Court at the time of the its rulings.

Fed. R. App. P. 10 provides the requirements for preparing the record on appeal. **Subsection (e)** which allows correction or modification of the record, provides, in relevant part: "If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court . . . may direct the omission or misstatement be corrected . . . ."

Clearly, the materials sought to be added to the record on appeal were not omitted as a result of either error or accident because they did not exist at the time the appeal was taken. Moreover, the relevance of these items is questionable, at best. The injunction issued by the state court was directed to and enjoined activities of the defendant from the date of issuance of the injunction forward. The record of the September 1, 1992 state court hearing included evidence, inter alia, that after seizures of plaintiff's vending machines in May, the defendant allegedly began soliciting bribes from plaintiff. Bribes were also allegedly solicited on August 17, 1992 and August 25, 1992 (merely eleven and six days, respectively, before the state court hearing). Plaintiff, disingenuously, now claims that the defendant's status under **§ 1442(a)(1),** for jurisdictional purposes must be considered only with respect to those occurrences before April 28, 1992. Clearly, the state issued injunction was directed to activities of the defendant contemporaneous with the injunction. The removal petition was filed after plaintiff filed on October 29, 1992, a

Petition for Rule to Show Cause seeking to hold the defendant in contempt for violating the preliminary injunction. The Petition for Rule to Show Cause alleges activities by the defendant on October 19, 1992, which were claimed to be in violation of the September 1, 1992, injunction.

A motion to supplement the record under **Rule 10(e)** is not a license to create a new record, or somehow change the record and the facts which were before the district court at the time it ruled. "The purpose of Rule 10(e) is to ensure that the court on appeal has a complete record of the proceedings leading to the ruling appealed from, not to facilitate collateral attacks . . ." ***United States v. Hillsberg*, 812 F.2d 328, 336 (7th Cir.) *cert denied*, 481 U.S. 144 (1987).** Further, "Rule 10(e) does not give this court authority to admit on appeal any document which was not made a part of the record in the district court. ***Borden, Inc. v. Federal Trade Commission*. 495 F.2d 785, 788 (7th Cir. 1974)** *quoted in* ***Hillsberg*, 812 F.2d at 336.**

The Court finds that plaintiff has not established any gounds for supplementing the record on appeal. The two terms which the plaintiff seeks to add to the record were neither before the Court at the time of its ruling nor omitted from the record due to error or accident. The Court finds that these materials are not of the type contemplated as an appropriate supplement to the record under **Rule 10(e)**.1 Accordingly, plaintiff's motion is **DENIED.**

IT IS SO ORDERED.

DATED: 17 December, 1993

William D. Stiehl
District Judge

The Court notes that even if these materials had been in existence before its ruling, their admissibility or relevance would have been, at best questionable. The Court does not consider a newspaper editorial to be either admissible or relevant as to jurisdictional inquiry. In addition, plaintiff's reliance on the state court testimony as relevant to this Court's judicial inquiry is misplaced as plaintiff has not accurately represented either the nature or context of defendant's testimony.

IN THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No. 93-CM-2582**
	)	
GEORGE VOGT,	)	
	)	
Defendant.	)	

REPORT OF PROCEEDINGS
MOTION TO SUPPRESS
Before the HONORABLE JOHN M. GOODWIN,
ASSOCIATE JUDGE
July 27, 1993

APPEARANCES;

MR. JOHN QUARENGHI, Assistant State's Attorney
On Behalf of the People; and,

MR. AMIEL CUETO, Attorney at Law
On Behalf of the Defendant.

JUDY L. TIEMANN, CSR, RPR
Official Court Reporter
C.S.R. License No. 084-003135

EXHIBIT A

that.

Go ahead, Mr. Cueto.

Q. (By Mr. Cueto) Where is this office where this telephone number goes to, where is that located?

A. In Chicago, Illinois

Q. Would this, by the way, have been the telephone number that the anonymous caller who called to complain about George Vogt's tavern, the Stadium Club, would this have been the number that this anonymous caller called to complain?

A. I have no idea.

Q. You don't even know whether this was an anonymous call; do you, sir?

A. I do not know.

Q. Okay. Did you tell that to the State's Attorney before you applied for a warrant in this case, this Vogt case?

A. They didn't ask me.

Q. Now, I want to go over this again, but I'm going to go -- they're occurrences in this record on April the 28th or 1992, at 11:55 a.m. This record shows that there was a telephone call from my law office to Chicago, 312-814-2213 which you have testified is the Office of the Illinois Liquor Control Commission. It lasted 8 minutes and 24 seconds; is that correct, sir?

A. Yes, sir.

Q. Now, before, on April the 28th of 1992 or before, were you engaged in a criminal investigation of Tom Venezia on behalf of the Federal Bureau of Investigation?

A. No.

Q. Between April the 28th of 1992 and September the 1st of 1992, were you engaged in a criminal investigation of Thomas Venezia on behalf of the Federal Bureau of Investigation

A. I'm not sure about the date, but I know that -- I'm not sure of the date.

MR. CUETO: Read back the question, again, please.

(The Court Reporter read the question back.)

THE WITNESS: I'm not sure of the dates, sir.

Q. (By Mr. Cueto) You're not sure of the dates what ?

A. I'm not sure of the dates that you're mentioning.

Q. Well, you're not sure of the dates because you were engaged in a criminal investigation on behalf of the Federal and Bureau -- Bureau of Investigation, of the FBI at some point, or you're not sure whether it was last summer? What do you mean you're not sure of the dates?

A. I'm not sure of the dates that you told -- you mentioned.

Q. You're not sure what about them?

A. When the investigations -- when -- of the dates that -- the starting and to the ending date in September you mentioned.

Q. Well, let's do it this way. September 1st of 1992 was the first time that you and I met, sir, and it was in this courthouse when I served you with a subpoena, and later on that morning I took your examination, that transcript. That was on September the 1st, 1992.

A. Yes, sir.

Q. You testified that day. You remember that, don't you sir?

A. Yes, sir.

Q. Prior to that date, that is, September the 1st of 1992, you were engaged in a criminal investigation of Thomas Venezia -- Thomas Venezia on behalf of the Federal Bureau of Investigation?

A. Yes.

Q. Okay. And when did that -- and you've already testified, by the way, that that was -- you had not been engaged in such an investigation before April the 28th of 1992. So we know that that investigation that you're talking about began on April or some time after April 28th of 1992 but before September 1st of 1992; is that correct?

A. Yes, sir.

Q. When did it begin?

A. I'm not sure on the day.

Q. Can you tell us the month?

A. I'm not sure, sir.

Q. Well, it had to be either two days in April, April the 29th or 30th, at any time during the month of May, June, July, or August. Does that refresh your recollection any?

A. No, it doesn't.

Q. How soon after the April 28th date, the date that Tom Daley called to report to your supervisor, how soon after that did the

investigation begin?

A. I don't remember the exact day.

Q. I didn't ask you the exact day. I said how soon after Tom Daley reported that you were trying to solicit bribes did you begin the investigation on behalf of the FBI?

A. I don't remember.

Q. Well, let's try it this way. Was it a matter of days, weeks or months?

A. Had to be maybe weeks.

Q. Okay. During May, you went out and seized some of Tom Venezia's machines at the B -- at the VFW Post 4183 in May of 1992; isn't that correct?

A. Yes, sir.

Q. Had that -- had the investigation on behalf of the FBI, that is, your investigation on behalf of the FBI against Thomas Venezia begun at that point when you seized those machines?

A. I don't remember.

Q. Did you go out there at the behest or the request of the FBI to seize Tom Venezia's machines in May of 1992?

A. I -- I went with the State Police as a request of the State Police to go with them.

MR. CUETO: Your Honor, I'd ask you to direct the witness to answer the question.

THE WITNESS: No, no.

THE COURT: Again, I'm going to honor the admonition of counsel and ask you to listen to the question and answer it. Your answer then I take it is no?

THE WITNESS: Yes, sir.

Q. (By Mr. Cueto) Now, how -- under what circumstances did you come to be conducting a criminal investigation into Tom Venezia on behalf of the FBI?

A. An individual person contacted me and stated that I should meet with a representative of Mr. Venezia's vending company.

Q. Who was this individual person?

A. Raymond Thornton.

Q. And how did he contact you?

IN THE CIRCUIT COURT
TWENTIETH JUDICIAL CIRCUIT OF ILLINOIS
ST. CLAIR COUNTY

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff,	)	
	)	
-v-	)	No. 92-CM-2582
	)	
GEORGE J. VOGT,	)	
	)	
Defendant.	)	

Before the Honorable John M. Goodwin, Judge

REPORT OF PROCEEDINGS
July 23, 1993

APPEARANCES:
John Quarenghi, Assistant State's Attorney,
Appeared on behalf of the State;
Amiel Cueto, Attorney at Law
Appeared on behalf of Defendant.

Heather Ogilvie, Official Court Reporter
CSR License No. 084-003388

Okay?

MR. QUARENGHI: Your Honor, can I call a sidebar at this time?

THE COURT: All Right.

(At this time, an off the record discussion was held.)

THE COURT: Thank you. We'll go back on the record when counsel begins questioning.

Q. These stories that you told Mayor Brauer, and I've already been over them several time, they have to do with Tom Venezia at a meeting with Bill Clinton. They have to do with the videotape of the Democratic National Convention where Tom Venezia appears and Bill Clinton is either on this tape or he's on the tape somewhere because he was there. All these stories that you related to Mayor Brauer in October of 1992, you say you did that as purely professional?

A. Yes.

Q. Is that correct?

A. yes, sir.

Q. How is that purely professional?

A. I'm responding now?

Q. Yes.

A. Basically, a share of information.

Q. And then what did you say?

A. I talked to him and I said yeah. Well, we have some -- I think we got an ongoing case. Then at that time -- or trying to get an injunction against me or something and I had informed him that I had heard that there was a videotape where Mr. Venezia was at a democratic committee.

Q. You mean the convention?

A. Convention. I'm sorry.

Q. What was he doing at this convention on the videotape?

A. I have no idea.

Q. Well, you heard he was on the videotape?

A. That's all.

Q. Whom did you hear that from?

A. I heard that from the FBI.

Q. Who in the FBI told you that?

A. I believe one of the agents we had talked about.

Q. Which agent?

A. At this time, I do not know. It was something I was not privied to.

Q. Was it Reginald Joseph?

A. Sir, there again, I do not remember which agent.

Q. Well, I'm trying to refresh your recollection. Was it Reginald Joseph?

BELLEVILLE NEWS-DEMOCRAT
OPINIONS
Sunday, August 29, 1993 Page 4A

Our viewpoint

Explanations in order

The Illinois Liquor Commission owes the public an explanation of its handling of a case involving the Stadium Club in Belleville.

The gambling charges against the bar's owner, George Vogt, were dropped on Thursday after the commission refused to hand over documents a judge had ordered it to produce. Without the documents, the state's attorney office couldn't make its case.

What's so puzzling is that it was the Liquor Commission that created this case in the first place. Video poker machines owned by Thomas Venezia were seized during a raid in April that was led by Liquor Commission agent Bonds Robinson, Jr.

What does the commission have to say about all this? The commission didn't "see any reason to hand over the documents." Even when a judge says to? No comment.

Understandably, St. Clair County State's Attorney Bob Haida is furious. He's mad that the commission won't cooperate with him, and won't even explain why. What's he supposed to do the next time the Liquor Commission comes to him, and wants him to invest time and resources prosecuting a case?

The case against the Stadium Club is gone, but the questions about the investigation and the commission remain.

The Stadium Club was raided days before the city election, and Belleville Mayor Roger Cook and his campaign manager, Phil Montalvo, suggested at the time that the raid might have been politically motivated. Venezia contributed $2,300 to Cook's campaign, and Venezia had become a campaign issue. Also in November, Venezia accused Robinson in court of harassing his clients. The state's unexplained refusal to turn over documents, rightly or wrongly, adds fuel to the speculation over why the Stadium Club raid was conducted in the first place.

We hope Haida carries through and investigates the commission and its agent, Robinson. If there's a problem with the commission or its agent, we ought to know. Until there's an explanation, the credibility and effectiveness of the commission and Robinson is going to be seriously compromised in St. Clair County.

NO. 93-2448

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

THOMAS VENEZIA,	) On Appeal from the U.S.
	) District Court for the Southern
Plaintiff-Appellant,	) District of Illinois
	)
v.	) No. 92-CV-867-WDS
	)
BONDS ROBINSON, JR.,	) Honorable William Stiehl
	) Judge Presiding
Defendant-Appellee.	)

ORDER

This cause coming before the Court; the court being fully advised in the premises and having jurisdiction of the subject matter; it is hereby ORDERED that the record on appeal be supplemented to include the testimony of Bonds Robinson in People v. Vogt, 93 CM 2582, marked as Exhibit A to Plaintiff's motion to supplement, and the editorial viewpoint of the Belleville News Democrat dated Sunday, August 29, 1993, marked as Exhibit B to the plaintiff's renewed motion to supplement.

_____
JUDGE

DATED THIS _____ DAY OF _____, 1994.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

THOMAS VENEZIA,	)	**Appeal from the United**
Plaintiff-Appellant,	)	**States District Court for**
	)	**the Southern District of**
NO. 93-2448 v.	)	**Illinois, East St. Louis**
	)	**Division**
BONDS ROBINSON, JR.,	)	
Defendant-Appellee.	)	**No. 92-CV- 867**
	)	
	)	**William D. Stiehl**
	)	**Judge.**
	)	

Upon consideration of:

1. "RENEWED MOTION TO SUPPLEMENT THE RECORD ON APPEAL" filed January 19, 1994, by counsel for appellant;

2. "DEFENDANT-APPELLEE'S RESPONSE TO RENEWED MOTION TO SUPPLEMENT THE RECORD ON APPEAL" filed January 31, 1994, by counsel; and,

3. "DEFENDANT-APPELLEE'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S RENEWED MOTION TO SUPPLEMENT THE RECORD ON APPEAL" filed January 31, 1994, by counsel,

IT IS ORDERED that #1 is **DENIED.**

AO 110 (Rev. 12/89) Subponea to Testify Before Grand Jury

United State District Court

SOUTHERN DISTICT OF ILLINOIS

TO: Custodian of Records
B & H Vending Co./Ace Music
123 West Main
Belleville, IL. 62220

SUBPOENA TO TESTIFY
BEFORE GRAND JURY

SUBPOENA FOR:

☐ PERSON ☒ DOCUMENT(S) OR OBJECT(S)

PLACE

UNITED STATES COURTHOUSE
750 Missouri Avenue
East St. Louis, IL

DATE AND TIME

9:30 a.m.
July 20, 1993

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):*

SEE ATTACHMENT

PLEASE SEE ADDITIONAL INFORMATION ON ATTACHMENT TO GRAND JURY SUBPOENA.

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

CLERK - Stuart J. O'Hare
(BY) DEPUTY CLERK Mona Zinerich
DATE: June 18, 1993

This subpoena is issued on application
of the United States of America
UNITED STATES ATTORNEY
Name, Address and Phone Number of Assistant U.S. Attorney
ROBERT L. GARRISON
Nine Executive Drive, Suite 300
Fairview Heights, IL 62201
(618) 628-3700

EXHIBIT "B"

ATTACHMENT

Any and all books, records, papers, documents, memoranda, computer printouts, and correspondence of B & H Vending Company/Ace Music (EIN:37-1231114) for the period October 1, 1988 to July 10, 1990, including, but not limited to, the following:

1. General ledgers, journals, records of sales, expenses, asset acquisitions and disposition, inventories, and cash receipts and disbursements.
2. Bank records, including statements of account, deposit tickets, cancelled checks, wire transfers, debit memos and credit memos for checking, savings, investments or other type accounts.
3. Invoices and other records of sales and purchases.
4. All financial statements, bookkeepers' and/or accountants' work papers used in the preparation of tax returns; retained copies all federal income, payroll and excise tax returns.

ATTACHMENT TO GRAND JURY SUBPOENA

In lieu of appearance before the Grand Jury, you may comply with this subpoena by sending the requested items to the following:

Robert L. Garrison
Assistant United States Attorney
Nine Executive Drive, Suite 300
Fairview Heights, IL 62208

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause by enclosing the same in an envelope addressed to such attorneys at their business address as disclosed by the pleading on record herein, with postage fully prepaid and by depositing said envelope in a U.S. Post Office mailbox in Belleville, Illinois on the 19th day of July, 1993.

ROBERT L. CARRISON
Nine Executive Drive
Suite 300
Fairview Heights, IL 62201
(618) 628-3700

x CLYDE L. KUEHN

U.S. Constitution Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. §1442(a)(1). Federal officers sued or prosecuted

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

28 U.S.C. §1446(b). Procedure for removal

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case is stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

735 ILCS 5/11-102. Preliminary injunction

§11-102. Preliminary injunction. No court or judge shall grant a preliminary injunction without previous notice of the time and place of the application having been given the adverse party.

(3)

Supreme Court, U.S.
FILED
SEP 2 1994
OFFICE OF THE CLERK

No. 93-1929

In the Supreme Court of the United States

OCTOBER TERM, 1994

THOMAS VENEZIA, PETITIONER

v.

BONDS ROBINSON, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
BARBARA L. HERWIG
FRANK A. ROSENFELD
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

19 pp

QUESTIONS PRESENTED

1. Whether this case was properly dismissed because petitioner has never served a summons on respondent.

2. Whether petitioner was entitled to discovery on the question of whether respondent properly removed the case under 28 U.S.C. 1442(a)(1).

3. Whether, under Illinois law, petitioner gave respondent adequate previous notice of his preliminary injunction request and the state court gave respondent adequate procedural rights at the preliminary injunction hearing.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1929

THOMAS VENEZIA, PETITIONER

v.

BONDS ROBINSON, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 16 F.3d 209. The opinions of the district court (Pet. App. A7-A15; App., *infra*, 1a-3a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1994. A petition for rehearing was denied on March 2, 1994. Pet. App. A16. The petition for a writ of certiorari was filed on May 31, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a vending machine operator, installed and operated video poker machines at a V.F.W. hall on Scott Air Force Base in Illinois. Respondent, an officer of the Illinois Liquor Control Commission, suspected that those machines were being used to pay off players in cash or liquor, in violation of Illinois law. In May, 1992, state agents seized three of petitioner's machines; in August, 1992, they seized another four of his machines. Petitioner alleges that before each seizure, respondent asked for a bribe in exchange for halting the imminent seizure. Petitioner says he agreed to pay the bribes in order to entrap respondent but that he did not actually pay them. Pet. App. A1-A2, A8-A9.

After the August, 1992, seizure, petitioner filed a petition in Illinois state court seeking a preliminary and permanent injunction against respondent. The requested injunctive relief would prohibit respondent from continuing to threaten or coerce him or extort bribes from him. Pet. App. A2, A7-A8. Petitioner did not give respondent prior notice of his petition. Instead, he merely served a subpoena on respondent demanding respondent's testimony. Petitioner concedes (Pet. 3, 21) that the subpoena was a "pretext" to get respondent to the courthouse. The subpoena was served on respondent fifteen to twenty minutes before the preliminary injunction hearing began on September 1, 1992. Pet. App. A2; see also 9/1/92 Hearing Tr. (Tr.) 4, C.A. App. A23. On its face, the subpoena does not reveal anything about the nature of the proceeding at which respondent was supposedly required to testify. Pet. App. A13; C.A. App. A18.

At the start of the hearing, petitioner called respondent to testify and began questioning him about

his investigation of petitioner. While respondent was on the witness stand, petitioner handed him a copy of the petition for injunctive relief. Petitioner did not stop questioning respondent in order to allow him to read the petition. Pet. App. A7-A8, A13; Tr. 6, C.A. App. A25. Petitioner has never served a summons on respondent in support of the petition, and the record shows no return of service. Pet. App. A10.

The state court denied respondent's request, made from the witness stand, to be allowed to obtain counsel. Pet. App. A7; Tr. 4-5, 22, C.A. App. A23-A24, A41. The court also refused to recess the hearing to let respondent make a telephone call. Pet. App. A8; Tr. 7, C.A. App. A26. In response to petitioner's questioning, respondent testified that he was "assigned to" the local office of the Federal Bureau of Investigation (FBI) at that time (Tr. 5-6, C.A. App. A24-A25), and that the FBI was involved in his investigation of petitioner (Tr. 10, 16, 23, 27, C.A. App. A29, A35, A42, A46). Respondent also gave some details of his discussions with petitioner and petitioner's employees about a plan to pay respondent $250 per week in bribes. But the court gave respondent no opportunity to present any affirmative testimony or evidence or any argument in his defense. Rather, the court told respondent to step down when petitioner had finished his direct examination of respondent. Tr. 29, C.A. App. A48. Immediately after the close of petitioner's case, the court granted the injunction. Tr. 49-50, C.A. App. A68-A69. The one-paragraph order, styled as a preliminary injunction, enjoined respondent "from threatening or coercing" petitioner or his employees, "from soliciting bribes or acts of extortion," and "from unlawfully interfering with" petitioner's businesses and "unlawfully seizing the property of" petitioner or his businesses. Pet. App. A9; C.A. App. A72.

On October 29, 1992, petitioner filed a petition for a rule to show cause, alleging that respondent had violated the injunction by demanding that two of petitioner's customers remove petitioner's vending machines. C.A. App. A73-A75.

2. On November 23, 1992, the United States Attorney filed a notice removing the case to the United States District Court for the Southern District of Illinois. C.A. App. A76-A78. The removal notice was based on 28 U.S.C. 1442(a)(1), which allows removal of an action brought against an "officer of the United States," or a "person acting under him," for any act "under color of such office" or under the authority of a criminal law enforcement statute. C.A. App. A77-A78. The notice stated that respondent "was engaged in an authorized and proper criminal investigation on behalf of the [FBI]," and that his "actions were necessary and proper to the performance of his duties" and thus "raise a colorable defense to the cause of action." *Id.* at A78. Those statements were supported by accompanying affidavits from respondent and two FBI special agents. *Id.* at A120-A125. The affidavits said that respondent was working under the direction and control of the FBI during the investigation of petitioner, including at the time of his August, 1992, bribery discussions and his October, 1992, actions in regard to two of petitioner's customers. *Ibid.*; see Pet. App. A3.

Petitioner moved to remand. In his motion, he asserted that he believed that respondent "was not acting in the capacity as a federal agent or officer at all times relevant to the facts and events which gave rise to this cause of

action," and he asked for discovery on that assertion. C.A. App. A102.[1]

On April 2, 1993, the district court denied the motion to remand. App., *infra*, 1a-3a. It reasoned that the FBI affidavits "reveal that during the time period set forth in the preliminary injunction motion, [respondent] was working under their direction in an ongoing criminal investigation * * *. It is not a requirement of jurisdiction under § 1442(a)(1) that all of the [respondent]'s activities be related to his federal duties." App., *infra*, 2a (citing *Lepucki* v. *Van Wormer*, 765 F.2d 86, 88-89 (7th Cir.), cert. denied, 474 U.S. 827 (1985). The court thus held that "[s]ubsequent discovery is irrelevant, and will not affect the Court's jurisdiction." App., *infra*, 2a.

On May 18, 1993, the district court dissolved the preliminary injunction and dismissed the action. Pet. App. A7-A15. It observed that Illinois law requires detailed findings to support a preliminary injunction, *id.* at A10 (citing *Hough* v. *Weber*, 560 N.E.2d 5, 13 (Ill. App. Ct.), leave to appeal denied, 564 N.E.2d 837 (Ill. 1990)), and that even more detailed findings are required to enjoin an ongoing federal criminal investigation, Pet. App. A11 (citing *Reporters Comm. for Freedom of the Press* v. *American Tel. & Tel. Co.*, 593 F.2d 1030, 1065 (D.C. Cir. 1978), cert. denied, 440 U.S. 949 (1979)). It criticized the state court for "ma[king] no specific findings as to any of the elements necessary to support a claim for injunctive relief," but relying instead on "general, boilerplate findings." Pet. App. A12. Moreover, the court held that respondent did not get "previous notice of the time and

[1] Petitioner argues (Pet. 3, 5) that the removal notice was untimely, but he does not challenge the court of appeals' conclusion (Pet. App. A4) that he waived that argument by failing to raise it in his motion to remand.

place of the applications" for the preliminary injunction, as required by Illinois law, Ill. Ann. Stat. ch. 735, para. 5/11-102 (Smith-Hurd 1992). Pet. App. A13. The court reasoned that the subpoena to respondent did not provide adequate "previous notice" because it was given to him only fifteen minutes prior to the hearing and "was silent as to the nature of the hearing"; the petition itself did not provide adequate "previous notice," since it was given to him while he was on the witness stand and he was not even given time to read it. *Id.* at A13. The district court thus dissolved the preliminary injunction. *Id.* at A15.

Next, the district court granted respondent's motion to dismiss the action. It observed that under Illinois Supreme Court Rules 101 and 102(d), the plaintiff must serve a summons on a defendant unless there is waiver of service of process or a general appearance. Pet. App. A13-A14. Here, the court explained, petitioner never served a summons on respondent or obtained return on service, and respondent's "forced appearance and testimony at the September 1st hearing [pursuant to a subpoena to testify] did not constitute a waiver of service, nor can it be said that his appearance constituted a general appearance." *Id.* at A14.

3. The court of appeals affirmed. Pet. App. A1-A6. It described the state court hearing as a "parody of legal procedure." *Id.* at A2. That hearing "violated so many rules of Illinois law—not to mention the due process clause of the fourteenth amendment—that it is not worth reciting them." *Id.* at A2-A3. The court noted that it had referred the case to the Judicial Inquiry Board of Illinois. *Id.* at A3 n.†.

The court of appeals next held that petitioner had not properly served respondent. It reasoned that "[a] subpoena is not a summons, and * * * handing the

defendant a copy of the complaint in open court * * * does not satisfy either state or federal requirements of service." Pet. App. A4. The court concluded that the failure of service, standing alone, "forecloses every avenue of attacking th[e] [district court's] judgment." *Id.* at A6.

As to the propriety of the removal, the court of appeals noted that "[a] federal defendant need not show that he is entitled to *prevail* in order to have access to the federal forum," only that "he *is* a federal official or is 'acting under' such an official." Pet. App. A5-A6. The court recognized that a plaintiff might be entitled to discovery to contest a defendant's assertion that he is a federal officer or acting under one. *Id.* at A6. This plaintiff was not entitled to it, however, because a plaintiff is allowed discovery "only after the defendant has been served with process." *Ibid.* (citing Fed. R. Civ. P. 33(a) and 34(b)). Since respondent "remains unserved," the court concluded, "[t]he district court was entitled to accept the affidavits at face value" and thus give respondent a federal forum. Pet. App. A6.

The court of appeals subsequently denied rehearing, with no judge voting for rehearing en banc. Pet. App. A16.

ARGUMENT

Petitioner seeks to raise a host of issues in challenging the decision below. Pet. i. None of them merits further review, however, because petitioner has never served a summons on respondent. That basic failure, standing alone, justified dismissal of this action, as the court of appeals held. Pet. App. A6. Petitioner's challenge to the other rulings by the courts below is also without merit.

1. The district court made three distinct rulings in two separate orders. In its first order, it denied petitioner's motion to remand the case to the state court and his request for discovery in support of that motion. App., *infra*, 1a-3a. In its second order, it dissolved the preliminary injunction and dismissed the action. Pet. App. A7-A15. The district court based only its third ruling—dismissing the action—upon petitioner's failure to serve a summons on respondent. As the court of appeals recognized, however, the failure of service was sufficient, standing alone, to justify all of the district court's rulings. See *id.* at A4-A6.

There is no merit to petitioner's challenge to the court of appeals' holding that this case fails for lack of service. As an initial matter, petitioner errs when he accuses the courts below of holding that before a defendant can be bound by a preliminary injunction, "he must first be served with a summons and complaint." Pet. 11; see also Pet. 9-11. That is not what either court below held. They held that, for an action to proceed to final judgment, a plaintiff must eventually effect proper service. Pet. App. A4, A13-A14. That holding is compelled under Illinois Supreme Court Rules 101 and 102(d), and those rules merely reflect well-established principles. A preliminary injunction is designed only to preserve the status quo pending the final disposition of the case. Even assuming that a preliminary injunction can be entered without service of a summons, unless service is eventually effected, the complaint must be dismissed and the preliminary injunction then becomes moot. Cf. *Cypress Barn, Inc.* v. *Western Elec. Co.*, 812 F.2d 1363 (11th Cir. 1987).

Petitioner has made no effort to excuse his failure to serve a summons on respondent, as the district court observed. See Pet. App. A14-A15. And as the court of

appeals held, "[a] subpoena is not a summons, and * * * handing the defendant a copy of the complaint in open court * * * does not satisfy either state or federal requirements of service." *Id.* at A4. To this date, petitioner has still not attempted to serve respondent, even after removal. See 28 U.S.C. 1448. Nor has he shown "good cause" for failing to serve within 120 days of the filing of the complaint. See Fed. R. Civ. P. 4(m) (applicable after removal under Fed. R. Civ. P. 81(c)). Nor has he attempted to argue that respondent waived service or made a general appearance sufficient to satisfy the service requirements under either Illinois or federal civil procedure. Such an argument would be doomed in any event, since respondent's only appearance in state court was at the hearing to which he was drawn by "pretext," and his only federal court appearances have been to remove and to move to dismiss for failure to serve (and to defend petitioner's objections to these actions). See Pet. App. A14.

2. In its first order, the district court denied petitioner's request for discovery on his motion to remand the case, holding that he had not identified any factual dispute that, if resolved in his favor, would have defeated removal jurisdiction. App., *infra*, 1a-3a. Since no summons had ever been served on respondent, the court of appeals correctly found it unnecessary to address that holding on the merits. See pp. 6-7, *supra*. In any event, the district court was correct in refusing to allow discovery on the propriety of removal.

Petitioner's challenge to the district court's ruling is based on a faulty premise: that to remove the case under 28 U.S.C. 1442(a)(1), respondent had to show that *all* of his actions relevant to the complaint were taken in the course of his federal duties. See Pet. 7. To the contrary, Section 1442(a)(1) allows removal of an action as long as

at least *some* of the relevant conduct of the defendant was carried out in a federal capacity. See *Lepucki* v. *Van Wormer*, 765 F.2d 86, 88-89 (7th Cir.), cert. denied, 474 U.S. 827 (1985). Thus, to uphold removal and defeat the motion to remand, respondent needed only to show that, at some of the relevant times and as to some of the relevant actions, he was acting in a federal capacity.

It is undisputed that respondent made that showing. Petitioner concedes that, as of August, 1992, respondent was working for the Federal Bureau of Investigation. Pet. 7. Thus, respondent was acting under federal direction and control in August, September, and October of 1992. That was when most of the events on which this action was based occurred, including respondent's August discussions with petitioner concerning the possible bribe, his August seizure of four of petitioner's machines, the September 1 state court injunction hearing, and his October contacts with two of petitioner's customers. Petitioner has asserted that respondent was not working under federal direction in April, 1992, when he first met petitioner and the first seizure occurred. See Pet. 6-7. As discussed above, however, that assertion is irrelevant to the propriety of removal. Consequently, petitioner was not entitled to discovery to support that assertion in connection with his motion to remand the case as improperly removed.[2]

[2] For the same reason, the courts below correctly denied petitioner's motion to supplement the record on appeal with transcripts from another case in which respondent allegedly conceded that he began to work for the FBI later than in April, 1992. See Pet. App. A32-A34, A44. The alleged concession was irrelevant to the propriety of removal. Moreover, the district court was correct in holding that petitioner was not entitled to have the transcripts added to the record under Fed. R. App. P. 10(e). That Rule permits modification of the record after

3. In its second order, the district court dissolved the preliminary injunction and dismissed the action. Pet. App. A7-A15. Both rulings were correct.

a. The district court dissolved the preliminary injunction on the ground that respondent and the state court failed to follow Illinois law in applying for and granting the injunction. Pet. App. A12-A13. The court of appeals agreed, calling the state hearing a "parody of legal procedure" and referring the case to the Judicial Inquiry Board of Illinois. *Id.* at A2-A3 & n†. Petitioner claims that those rulings constitute excessive federal interference with state law matters. Pet. 9-12. To the contrary, they merely apply the text of the Illinois statute and basic precepts of due process.

The Illinois statute provides:

> No court or judge shall grant a preliminary injunction without previous notice of the time and place of the application having been given the adverse party.

Ill. Ann. Stat. ch. 735, para. 5/11-102 (Smith-Hurd 1992). Petitioner argues that Illinois case law allows the "previous notice" to be informal. Pet. 9. But the same case law holds that, however informal the notice, it must be given in advance of the hearing. See *Board of Educ.* v. *Parlor*, 424 N.E.2d 1152 (Ill. 1981). That did not occur

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initiation of the appeal only if the omission was "by error or accident" or something is "misstated;" modification is not permissible "to create a new record, or somehow change the record and the facts which were before the district court at the time it ruled." Pet. App. A33-A34. The transcripts petitioner sought to add to the record and the newspaper editorial (*id.* at A35-A42) could not have been omitted by accident "because they did not exist at the time the appeal was taken," but only were created after the appeal was pending. *Id.* at A33.

here. The only advance notice of the hearing was a subpoena served on respondent fifteen to twenty minutes before the hearing, which on its face only sought his testimony in a proceeding the purpose of which was not identified. Pet. App. A2, A13; Tr. 4, C.A. App. A23; see also C.A. App. A18 (text of subpoena). Petitioner admits that this subpoena was a "pretext" to draw respondent into the courtroom, where he could then be present for the preliminary injunction hearing. Pet. 3, 21.[3] Respondent was handed the petition for injunctive relief on the witness stand, in the midst of his compelled testimony, and he did not even have a chance to read the petition before his examination by petitioner's counsel continued. Pet. App. A7-A8, A13; Tr. 6, C.A. App. A25. This calculated effort to draw respondent into a trap cannot constitute "previous notice" of the hearing for purposes of the Illinois statute.

Moreover, these actions, as well as others by the state court, denied respondent due process of law. The state court denied respondent's request to be able to obtain counsel, or even to make a telephone call; it gave him no opportunity to present affirmative testimony of his own or from other witnesses or to cross-examine petitioner's two other witnesses; and it did not permit him to present any argument at the close of petitioner's case. The state court awarded the preliminary injunction without making any specific findings. Moreover, the injunction failed to specify the acts enjoined. See Pet. App. A9. The

[3] Petitioner alleges that the plan to call respondent to the courthouse was a joint decision by his counsel and the local State's Attorney (Pet. 3, 21). Although that allegation concerns matters outside the record, we note that we have brought the allegation to the attention of the State's Attorney, and he has furnished us with an affidavit stating that it is false.

federal district court and the court of appeals did not overstep their role in a removed case when, based on state law and constitutional principles of due process, they dissolved this injunction and referred the case to a state body for possible discipline against the judge.

b. The district court dismissed the action because petitioner failed to serve a summons on respondent. Pet. App. A13-A14. That disposition was correct for reasons discussed above in Point 1. See pp. 7-9, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1994

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

THOMAS VENEZIA, PLAINTIFF-PETITIONER

v.

BONDS ROBINSON, JR., DEFENDANT-RESPONDENT

Cause No. 92-CV-867-WDS

[Filed Apr. 2, 1993]

MEMORANDUM AND ORDER

STIEHL, Chief Judge:

Before the Court is plaintiff's motion to remand. This action was removed from the Circuit Court for the Twentieth Judicial Circuit, St. Clair County, Illinois, pursuant to 28 U.S.C. § 1442(a)(1). Prior to its removal, the Circuit Court had issued a preliminary injunction enjoining and restraining the defendant from threatening or coercing plaintiff, soliciting bribes, interfering with plaintiff's business, or seizing any property of plaintiff or his businesses, Ace Music or B&H Vending. Plaintiff filed a petition

for rule to show cause in the state court action, and the United States filed then [*sic*] removed the case to this Court. The removal alleges that at all times relevant, defendant was an officer of the United States, or a person acting under him, and acting under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals. 28 U.S.C. § 1442(a)(1). The government asserts that the defendant was engaged in and acting on behalf of an authorized and proper criminal investigation on behalf of the Federal Bureau of Investigation.

In his motion to remand, plaintiff asserts that he believes that defendant was not acting as a federal agent or officer at all times relevant, and that plaintiff has propounded discovery requests on defendant to that effect. Plaintiff prays that the Court remand the action after "sufficient discovery" has been completed.

This Court has jurisdiction over actions which involve an officer or agent of the United States under 28 U.S.C. § 1442. The affidavits of FBI Special Agent Larry Skora and FBI Supervisory Special Agent Reginald J. Joseph reveal that during the time period set forth in the preliminary injunction motion, defendant was working under their direction in an ongoing criminal investigation in the Southern District of Illinois. It is not a requirement of jurisdiction under § 1442(a)(1) that all of the defendant's activities be related to his federal duties. *See Lepucki v. Van Wormer*, 765 F.2d 86, 88-89 (7th Cir.), cert. denied, 474 U.S. 827 (1985).

Subsequent discovery is irrelevant, and will not affect the Court's jurisdiction. This action was properly removed, and this Court has jurisdiction

over this action. Accordingly, plaintiff's motion to remand is DENIED.

IT IS SO ORDERED.

Dated: 2 April 1993

/s/ William D. Stiehl
CHIEF JUDGE